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4.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF CHANCERY

OF THE

STATE OF NEW YORK,

BEFORE THE

HON. LEWIS H. SANDFORD,

LATE VICE-CHANCELLOR

OF THE FIRST CIRCUIT.

VOL. III.

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PUBLISHERS' PREFACE.

THIS volume brings down Vice-Chancellor Sandford's decisions to August, 1846. Another volume, which will be put to press without delay, will complete the series of his judgments in the court of chancery. Several of the cases which will appear in the fourth volume, are exceedingly interesting and important; such as *Iddings v. Bruen*, *Monroe v. Douglas*, *The Heirs of Anneke Jans v. Trinity Church*,; and others equally well known to the bar of New York.

The publishers venture to assure the profession, that the cases in the volume now issued, well sustain the interest and value of those which have preceded it.

The usury defences, and especially that of the Dry Dock Bank; the Gilbert Will case, and several others on the construction of wills, *Clarke v. Sawyer*, on the subject of mental capacity to make a valid will; the case of Smith's Executors, on the validity of an accommodation endorsement put in circulation after the endorser's death; *Sagory v. Dubois*, on the liability of subscribers to stock in corporations and associations, to pay up their shares on the insolvency of the company; and the unusually intricate and important mortgage cases of Loomer and of King, will at once attract the attention of the reader. In short, a reference to the index will show that almost every head of equity jurisdiction, has been illustrated in this volume.

The publishers rely with confidence, on the continued approbation of the bar in their undertaking.

New York, March 10, 1848.

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CASES IN CHANCERY.

BERRY *v.* CROSS and others.

A voluntary joint stock association was formed for owning and conducting ferries. By the articles, seven trustees were to be elected, who were to be vested with the property, hold it for the stockholders, and be liable for the debts; and every vacancy among the trustees, by death, resignation, or otherwise, was to be filled at the annual meeting. B. was elected one of the trustees and acted. A., another trustee, resigned, whereupon an election of trustees was ordered and notice given, and an election held, at which seven were chosen, displacing B. B. acted as a trustee in appointing inspectors of election, and at the election voted for seven, including all the old trustees except A. On B.'s being excluded from the further management of the association, he filed a bill for an account and dissolution.

Held, that his acts respecting the election, did not effect a resignation of his office, and that there was no vacancy to be filled except that made by A., and that B. was still a trustee.

May 6; August 4, 1845.

THE bill in this cause was filed on the 25th of November, 1843, for the dissolution of a partnership existing between the complainant, Berry, and the defendants, in certain ferries between the city of New York and the village of Williamsburgh,—and for an account of the joint concerns.

The bill stated that on the 15th of May, 1841, the parties formed themselves into a voluntary association under the name of The Williamsburgh and New York Union Ferry Association, by articles of agreement which were signed by the associates, and which were set forth at large in the bill. These articles provided for a capital stock of fifty thousand dollars, divided into five hundred equal shares. The object was declared to be the establishment and maintenance of ferries between New

Berry v. Cross.

York and Williamsburgh, landing at designated points. The property of the association was to be vested in seven trustees, who were to be elected by the stockholders from among their number. The agreement then contained this clause; "And every vacancy among said trustees by death, resignation or otherwise, shall be filled at the annual meeting hereinafter provided for." It further provided that the trustees, or their survivors or successors, should hold the real and personal property of the association for the benefit of the stockholders, &c. By the fifth article there was to be a stated meeting of the stockholders once in every year, on the first Monday of ———, (which blank was never filled.) The agreement recited that the trustees had the custody and possession of the estate of the association, to indemnify them for all their engagements; and it therefore declared that the stockholders were not to be liable for any contracts made by the trustees.

The bill further stated, that at the first election, regularly held on the third day of July, 1841, the complainant, the defendant, John A. Cross, with Abraham Boerum, and four others, were elected trustees of the association. That the trustees soon thereafter obtained the requisite lease of the ferries from the corporation of the city of New York, and on the first day of May, 1842, entered into the full possession and control of the ferries, and contracted a large amount of debts, for which the complainant became personally liable, a great part of which remained outstanding. That the complainant has never resigned his office as trustee. That at a regular meeting of the trustees held June 28th, 1843, it was resolved that an election of trustees of the association be held on the 19th day of July ensuing; but on the first day of July at a special meeting, that resolution was rescinded, and it was then resolved that the election be held on the first Monday of August. At a special meeting on the 20th of July, notices of the election were directed to be published. On the second of August there was a special meeting of the trustees, when inspectors of the election were appointed, and another on the fifth, when the place of one of those inspectors was filled. The complainant had been informed the election was to be held

to fill a vacancy occasioned by the resignation of Abraham Boerum, and was present at the two meetings last mentioned. On the first Monday of August, 1843, an election was held, seven trustees were voted in, and a certificate of their election was filed,—by which it appeared that all the original trustees were elected except the complainant and Boerum. The complainant attended at the election, and voted for a new trustee in place of Boerum, and for the six other original trustees, supposing that those six continued as a matter of course, and that he acted throughout only to fill Boerum's vacancy.

The bill further stated that the trustees held a meeting on the 26th of August, 1843, at which the complainant appeared and claimed to act as trustee, but was prevented by the others. He demanded his seat as trustee, but it was refused to him by Mr. Cross, the president. He has ever since been prevented from taking any part in the management of the ferries and property. The bill denies the right of the stockholders to oust him in the manner stated; but the complainant has offered to resign and transfer the title to the property on being indemnified against the debts and liabilities which he had incurred as trustee.

The answer of the defendants who were and claimed to be trustees, admitted most of the statements in the bill. It was silent as to the fact of any resignation by the complainant, but stated that he was present and participated in the resolutions to go into a general election of trustees, and was present at the election and voted for an entire board. The answer insisted that these acts were a resignation of his office of trustee, and conclude the complainant on that point.

It appeared by the testimony, that Boerum resigned as stated in the bill, or had entirely refused to act further as a trustee; that the complainant was not present at either of the meetings which directed the election and the publication of the notice of the same; that he was present at the meetings on the 2d and 5th of August, and at the election; and that when he filed his bill, the debts of the association were \$3385, besides the covenants into which the trustees had entered in the ferry leases.

The cause was heard on the pleading and proofs.

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The parties agreed upon the form of the decree to be entered, if the court were with the complainant.

J. Dikeman, for the complainant.

W. W. Campbell, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—There is no provision in these articles for stated elections of trustees ; but every vacancy among the trustees by *death, resignation, or otherwise*, was to be filled at the *annual meeting* of the stockholders. The fifth article declared that there should be a stated meeting of the stockholders once in every year, on the first Monday of ———. This blank was never supplied or filled ; and no such stated meeting appears to have been held. The seven trustees were elected in July, 1841, and the election in question was in August, 1843.

The first inquiry is whether Jacob Berry's place as trustee was vacant at the time of the latter election. He never *resigned*. This is alleged in the bill, and is admitted by the silence of the answer in regard to it. If he had resigned, the fact must have come to the personal knowledge of some one of the trustees who are defendants. (*Rule 17th.*)

Instead of his having resigned, he was present acting as a trustee, and his right thus to act conceded, on the second of August, 1843, which was after the election had been ordered and the notice published ; and again on the fifth of August, which was the last meeting held before the election, and was only two days before it took place. So far as the complainant participated in the proceedings prior to the day of the election, his conduct is clearly referrible to the vacancy occasioned by the resignation of A. Boerum, one of the trustees. There was thus, no vacancy up to the day of the election.

It is insisted that the complainant's voting for seven trustees on that day, was in effect a *vacatur* of his office, if not a distinct resignation. I think the former proposition depends upon the latter. There was no vacancy unless it were made by the voluntary act of the complainant ; which act, whatever it may

have been in form, would be a resignation. Then was his vote, a resignation of his office? He voted for himself and all the trustees who were in office, excepting Boerum. His object is to be derived from this act alone. He said nothing which indicated a design to vacate or give up his post. This act surely indicated a directly contrary intention. It showed that he did not wish or intend to leave his place as a trustee. And I cannot perceive how there can be a resignation derived from conduct which evinces a determination not to leave the office, and where there is no proof of any intent to resign or vacate.

It will not do to say that his vote for seven trustees, shows that he considered the whole number vacant. There is no evidence of what his view was; but it is plain he could not have deemed the whole vacant. There had been but one resignation, and no other was known to be in contemplation. He could not have known that the five other trustees would vote for any more than one person to fill the existing vacancy; and there is no proof that they did vote for more than one person. The notice of the election did not specify the number of trustees which was to be chosen. In fine, the complainant's explanation in his bill, is as probable as any that has been suggested; and far more probable than the idea that he intended to resign his office, or what is equivalent, leave it to the stockholders to say whether or not he should continue.

The whole thing appears to be a misconception. If the act of voting at the election produced the vacancy, how could the stockholders there present, know of such vacancy so as to vote for supplying it? The vote was by ballot, and until the poll was closed, and the votes counted, it could not regularly be known that Mr. Berry, or any other of the six trustees, had voted for seven trustees, or had so voted as to vacate their offices; and thus none of the stockholders would know till it were too late, whether there was one vacancy or seven in the board of trustees.

This view of the case relieves me from considering the regularity of the election in point of time. It is said that it was not at the stated annual meeting, and was not advertised as such.

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On the other ground, I am satisfied that the complainant is still a trustee and was warranted in filing his bill.

The arrangement made between the parties, will dispense with any farther provision than this, that the defendants pay the costs of the suit.

WILKES and others v. HARPER and others.

An executor, who was also a devisee and legatee, wasted a large portion of the assets of the testator being more than double his own proportion of the whole estate, and the other legatees were thereby compelled to pay a debt of the testator which he might and ought to have discharged out of the personal effects. In a suit between such legatees, and a creditor of the executor, whose judgment was a lien upon unsold real estate devised to the executor, it not appearing that the devastavit was committed before the docketing of the judgment; it was held, that the legatees could not have priority over the legal lien of the judgment creditor, to enforce their right against the defaulting executor upon the real estate so devised to him.

If it had appeared that the whole devastavit had been accomplished before the lien of the judgment attached, *quere* whether the equity of the legatees should be preferred, against such real estate, to the lien of the judgment creditor?

May 5, 6; August 12, 1845.

THE bill was filed on the 24th day of July, 1844.

The complainants are the executors, devisees and legatees of Charles Wilkes, who died on the 30th August, 1833, leaving personal property amounting to about \$250,000—besides a large real estate. His executors were his sons, Horatio, Hamilton and George, and his widow Janet Wilkes; all of whom qualified. He gave to his widow the choice of two houses, (one of which, No. 28 Laight street, was selected by her,) to have during her life; also divers movables, and the income of \$50,000. The residue of the estate, less some small legacies, he devised and bequeathed to his children.

The executors entrusted the whole management of the estate to Horatio Wilkes. They sold all the real estate, except the house 28 Laight street, for \$95,307. Previous to the 25th of

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December, 1835, Horatio W. had received divers sums for income of the estate, and paid various claims upon it, and also the small legacies; and he then had remaining, \$203,239 99, exclusive of the proceeds of certain lots. Of this amount, \$50,000 was set apart to produce the widow's annuity. Hamilton Wilkes at that time received upon his distributive share of the property, \$26,000, the proceeds of real estate sold by the executors; and the other children received from Horatio, in the aggregate, \$101,802 50. This left in Horatio's hands \$51,437 49, of the funds of the estate, exclusive of the annuity fund. The whole of this, and \$27,000 of the sum set apart for the widow, he wasted prior to January, 1840. The sum left in his hands in December, 1835, was more than all the outstanding debts or claims against the estate.

At the time of his death, Charles Wilkes had in his possession, \$10,000 belonging to Mrs. Maria Garnett of the city of Paris, which he had invested in his own name for her benefit. The investment went into the hands of Horatio as executor, and continued in the same form. On the 1st September, 1840, the fund with unpaid interest, amounted to \$12,592 40; and it was thenceforth held by Horatio, at the request of Mrs. Garnett, as the property and for the benefit of Miss Fanny and Miss Harriet Garnett,—to whom Mrs. G. assigned the fund. Horatio Wilkes wasted and misapplied this fund and the securities in which it was invested.

The Misses Garnett claimed the amount with interest from the estate of Charles Wilkes, and it was paid to them, amounting on the 1st May, 1840, to \$12,734 73. Of this sum, \$2400 was paid out of the remains of the estate, and there being no more of it left, Hamilton W. paid the balance, at the request of the other complainants, out of his own funds.

A similar claim for \$6000 and interest, had been made against the executors by William Banks, administrator of Margaret Campbell, which is now pending in the Court of Chancery.^(a)

Horatio Wilkes died on the 23d March, 1840, intestate, with-

(a) See the report of this case—*post*, *Banks, Executor, &c., v. Wilkes*.

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out issue, and wholly insolvent. He had spent all his share of the estate, except his remainder in the house 28 Laight street, which is worth less than the Garnett debt. There were judgments against him when he died, to more than \$50,000.

The complainants are his heirs and next of kin, and George Wilkes is his administrator.

On the 7th of January, 1837, the defendants recovered a judgment against Horatio Wilkes for \$2838 40, for an individual debt of his, having no connection with the estate of C. W. In May, 1844, they sued out a scire facias against the complainants and others, in order to have execution against the interest of Horatio W. in the Laight street property.

The complainants claimed a prior lien upon that interest in respect of the Garnett debt, and of the Campbell debt if that be established against them.

The bill prayed for a decree accordingly, and that Horatio's interest might be sold, and the proceeds applied to the complainant's claim; and for a perpetual injunction against the scire facias.

The answer insisted that the complainants have no lien upon the real estate in question, nor any right thereto which is not subsequent to the lien of the defendant's judgment.

W. M. Evarts and J. Prescott Hall, for the complainants.

H. E. Davies and S. A. Foot, for the defendants.

The following points were made in behalf of the complainants.

I. The bill claims an equitable lien in favor of the complainant Hamilton Wilkes, upon the estate of Charles Wilkes, devised to Horatio Wilkes, and of which Horatio died seised, on account of a debt of the testator's paid, *in solido*, by Hamilton, and to which Horatio's share of the testator's estate is bound to contribute, and that such equitable lien is superior to the lien at law of the defendant's judgment.

1. The lands devised were liable to contribute, rateably to the

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payment of this debt of the testator. (2 R. S. 369, 372; § 32, 36, 48, 60, 2d ed.)

2. The payment of this debt, *in solido*, by one of the devisees, entitles him to be subrogated to all the rights, remedies and liens, which the creditor had before such payment, upon or against the testator's estate in the hands of the other devisees for their contributory share towards the payment of the testator's debt. (1 Story Eq. 499; *Cuyler v. Ensworth*, 6 Paige, 32; *Eddy v. Traver*, 6 Paige, 521; *Sohermerhorn v. Barhydt*, 9 Paige, 28.)

3. The rights and liens of such creditor of the testator, and therefore of such subrogated devisee, are paramount and superior to any lien which any individual creditor of any other devisee, can obtain upon the devised estate in the possession of his debtor. (*In re Howe*, 1 Paige, 128; *Morris v. Mowatt*, 2 Paige, 586.)

3. The complainant, Hamilton Wilkes, therefore, has an equitable lien to the amount of \$2200, or thereabouts, upon Horatio's estate in remainder in one-sixth of the house in Laight street, superior to the lien at law of the defendant's judgment, and the injunction was properly allowed and should be continued on this ground.

II. The bill further sets forth the pendency of a suit in this court, for the establishment of a claim against the estate of Charles Wilkes, to the amount of some \$9000, and that, in case of the adverse result of that suit, the assets of the testator's estate being exhausted, the real estate of the testator in the hands of the devisees will be subject to the satisfaction of such debt.

1. The debt, when established, will be an equitable lien upon the devised estate of Charles Wilkes, of which Horatio Wilkes died seised, for its contributory share thereto, superior to the lien at law of the defendant's judgment upon the grounds above stated.

2. The complainants, the other devisees of Charles Wilkes, are entitled to have this devised estate of Horatio's reserved from execution and sale for his individual debts, until the decision of the pending suit, that in case such claim should be established against the testator's estate, Horatio's share of the devised estate may

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contribute thereto, and the injunction was properly granted and should be continued on this ground.

III. The bill sets forth, that Horatio Wilkes was the sole acting executor, (though others qualified,) of the estate of Charles Wilkes; that there were abundant assets of the estate to pay all the debts of the same; that Horatio was guilty of a devastavit, and upon an accounting as of January 1, 1840, was found to be indebted to his father's estate in the sum of \$59,112 26.

1. The co-devisees of Horatio as against him, are entitled to have the real estate which was devised to him by his father, subjected, *in solido*, to the payment of the debts of the estate of Charles Wilkes, before they shall be called upon to contribute, and would have an equitable lien to that effect upon Horatio's share of his father's estate in his hands, or in the hands of his heirs or devisees.

2. A judgment-creditor's lien upon the property of his debtor is always subject to every superior equitable lien upon the same, whether latent or otherwise.

3. This equitable lien is set up in the bill, and the injunction was properly granted, and should be continued upon this ground also.

IV. The co-devisees of Horatio have also an equitable lien upon their testator's estate in the hands of Horatio to make good the whole sum of \$59,112 26, and interest from January 1, 1840, lost to them by reason of the devastavit of Horatio, and if there were no debts of the estate of the testator to be provided for, the co-devisees of Horatio would have a better lien upon his estate derived from their testator, than any individual creditor of Horatio could have.

1. Horatio will be deemed to have taken his full share of the testator's estate in the sum which he wasted, and any devised property found in his possession after the devastavit will be treated as a residuum of the testator's estate for distribution among the other devisees.

2. This lien is set up in the bill, and the injunction was properly granted, and should be continued on this ground.

The defendant's counsel made the following points.

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I. Charles Wilkes, the testator, left no real estate undevise; and sufficient personal property to pay all his debts, and although a large amount of his real and personal property was wasted and misapplied by Horatio Wilkes, his son, and the acting executor of his will, still there was personal property unwasted by him, and actually applied to the payment of the testator's debts, and distributed among his legatees, sufficient to pay all his debts.

II. No creditor of the testator, nor any person, standing in the place and having the rights of a creditor, has been unable, after due proceedings in any court, to collect his debt against said testator from his personal representatives, next of kin, or legatees.

III. On the facts stated in the first and second points, the complainants have no equitable claims on the real estate devised to Horatio Wilkes, and in controversy in this case, which can affect the lien of the defendants under their judgment against him.

IV. The debt or demand which the complainants had against Horatio Wilkes in his lifetime, and since his death against his representatives, constitutes no equitable lien on his real estate devised to him by his father, especially to the prejudice of the lien of the defendants by virtue of their judgment.

The counsel for the defendants cited 2 R. S. 369, &c., § 32 to 36, 48, 56, 59; *Schermehorn v. Barhydt*, 9 Paige, 28, 29, 46, 47.

THE ASSISTANT VICE-CHANCELLOR.—If the Garnett's in May, 1840, had proceeded to collect their debt against the estate of Charles Wilkes, they would not, according to the provisions of the Revised Statutes, have reached the real estate in question, in the regular course there marked out. Their proceeding was first, against the executors. That would have proved fruitless beyond the \$2400. As there was no intestacy, their next remedy was against the legatees; and this would have produced the amount of the claim. Their suit against the devisees lay beyond that against the legatees, and was open to them only upon the entire or partial failure of the latter. *Eddy v. Traver*, (6 Paige, 521,) to which I was referred, differs from the case before me in this, that the personal estate of Eddy was insufficient to

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pay his debts, and therefore the creditors from the first, had a right against the real estate. That right affected the whole land in the possession of the heirs at law, and having been enforced against a part which one of the heirs had aliened, the alienee was subrogated to the creditor's right against the residue of the land still held by such heir.

There is no doubt of the principle advanced by the complainants, that the lien of a judgment upon the lands of the debtor, is subject to all prior equities which existed in favor of third persons against such lands, *at the time of the recovery of the judgment*. It is, in short, a lien upon such interest as the debtor then actually has, and is affected by the latent equities and liens of others. Herein it differs from the lien of a mortgage; for the latter in favor of one who makes an advance in good faith without notice, is upheld against all such prior equities. The mortgagee is a *purchaser*; the judgment creditor has a general lien upon the existing right of the debtor.

The defendant's judgment in this case was recovered in January, 1837, and if they are to be affected at all by the claims set up in the bill, it must be by some equity in favor of the complainants which existed at that time. Hence those claims are to be regarded, as they would have stood in January, 1837. And it was in this point of view, that at the hearing I deemed it material to know whether the grievous devastavit of Horatio Wilkes, which has so much implicated his family, was committed before or after that period. If it were subsequent, the fact that he at that date had in his custody, funds of the estate which he might squander, and thus implicate the other legatees, constituted no equity which could attach upon the land devised to him. The equity which is to impair this judgment, must be one prior to the judgment, otherwise the legal lien of the latter will prevail.

Horatio W. after such lien attached, could no more divest or postpone it by a devastavit, than he could by a mortgage or a sale. In this question of priority, no reference is had to the time of the Garnett's making their claims, or of its payment. The claim existed before the judgment, although enforced afterwards. On the principle upon which the bill is founded, the claim fur-

nishes a basis for the equity set up, provided the waste of the estate had occurred prior to the docketing of the judgment.

But I do not think that the legal propositions for which the complainants contend, will support their case as it is exhibited by the proofs. They do not show when their alleged equity originated, except that it was between December, 1835, and January, 1840. The court cannot upon this proof, hold that it was before January, 1837. And my conviction is clear, that no subsequent devastavit could raise an equity which would interfere with the lien of the judgment.

I will illustrate this farther, by stating what I consider to be the *rationale* of the complainant's argument, without however committing myself in its support. For this purpose, let it be admitted that on the first of January, 1837, Horatio Wilkes had wasted the estate and the Garnett fund, so that in 1840 the latter had to be made good by his brothers and sisters. I commenced with showing that in such a state of things the Garnetts, in the regular course, could not have reached the undivided real estate of Horatio which remains. The complainant's argument is, that on the Garnett's filing a bill in December, 1836, to enforce their claim, in which Horatio and all the others would have been defendants; the law clearly entitled them to a decree for payment against Horatio, Hamilton, and the others as legatees. Then if pending that suit, the present complainants perceiving that they were to be brought in personally for the debt, had filed a cross bill against Horatio and the Garnetts, setting forth that an ample fund was left in Horatio's hands to pay this debt, which he had squandered; that as between him and them he ought to pay the whole of it, and that there still remained to him the undivided estate in remainder in the Laight street house; that this was devised to him by the will, and that in equity it ought to be applied to the Garnett debt, to make up from the realty left to him, the property of others left by the same testator, which he had wasted. And then the cross bill had prayed for a decree to sell this real estate, and out of it to pay the Garnett debt.

Such a course would have exhibited the claim; and its justice is perfectly manifest. The only open point in it is, whether such claim is a right or equity enforceable directly against the land;

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or whether it is any thing more than a debt for money paid, to which all the debtor's property is liable, but which is not chargeable upon any specific portion of it until judgment or execution.(a) The complainants contend that it is the former, and on that footing it would be an equity superior to the lien of a subsequent judgment. But my statement of the proposition shows, that the equity must exist prior to the judgment; and this the case before me does not establish.

I am therefore not called upon to decide, whether there was such an equity upon a devastavit prior to 1837.

If as seems probable, the waste occurred before the defendant's judgment, the complainants ought to be permitted to present the question fairly to the court.

I do not feel at liberty to retain the bill for amendment at this late stage of the cause, and unless the defendants consent to its being amended on terms, it must be dismissed with costs, and without prejudice to a new bill.

There is one inducement on their part to permitting such amendment. In the event of the claim against them being sustained on this bill after amendment, they would not be subjected to the costs of the suit.(b)

(a) See the difference between a right to proceed against a fund, and an equitable or other lien thereon, illustrated in the instance of specialty debts of the ancestor, the heir having aliened the estates descended. *Richardson v. Horton*, 7 Beavan's R. 112.

(b) The defendants declining to allow the amendment suggested, the bill was dismissed with costs, and without prejudice.

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A husband cannot be a witness in favor of his wife, or of her trustee, in a suit respecting her separate estate ; although he has no interest in the subject matter.

This was held on the ground that public policy prohibits husband and wife from being witnesses for or against each other in civil cases, and from testifying during or subsequent to the marriage, concerning what transpired between them while the marriage subsisted, or came to their knowledge by reason of the married relation.

Where two or more parties are interested in a lease about expiring, one of them cannot take a new lease in his own name to the exclusion of the others. And if, after undertaking with the others to procure a renewal, he take it to himself, and attempt to retain it solely, it is a fraud upon his associates.

P. conducted a refectory, owning three-fourths of the lease, fixtures, stock and movables ; and S. owned the other fourth. B. and M. held mortgages on P.'s interest, which were deemed not quite secure ; arrears of rent were due and a distress made. B. and M. in the absence of S., agreed with P. to pay the rent in arrear, if he would give them instant possession of the refectory, and that they would protect the interests of S., who was to refund to them one-fourth of the arrears. They received possession of the whole accordingly, and placed an agent in charge. S. on his return assented to what had been done. B. and M. did not pay the arrears, but suffered a sale therefor under the distress, at which they became the purchasers of the fixtures, stock and movables, and continued the business. The lease had nearly expired, and before the sale it had been arranged that B. should procure a new lease for the common benefit of S., B. and M. He obtained the renewal in his own name and claimed it as his own ; and soon after he and M., separately, sold their respective interests in the whole concern, to K., and delivered to him possession of the whole, which he maintained, excluding S. In a suit by S. against B., M. and K. ; *Held*, 1. That B. and M. were bound to account to S. for one-fourth of the profits from the time they took possession, till their sale to K., and for one-fourth of the price obtained for the refectory from him, and were entitled to credit for one-fourth of the rents paid by them upon the distress and subsequently.

2. That the new lease obtained by B., enured to the benefit of M. and S.
3. That P. was a competent witness for S., though he was originally to pay the rent as a part of the expenses of the refectory.
4. That K. was also a competent witness for S., his liability being secondary to that of B. and M., and all being liable, *ex delicto*.
5. That the statute of frauds has no application, either to the agreement to pay the arrears of rent, or to the interest which S. claimed in the renewed lease.

April 10, 11, 12, and May 8 ; August 28th, 1845.

THE bill was filed April 29th, 1843, by George P. Burrell as

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the trustee of the separate estate of Mrs. Louisa M. Stewart, and Mrs. Stewart by Burrell as her next friend, against Michael K. Burke, Marcus Bull, Henry S. McKean, W. Coventry H. Waddell the general assignee in bankruptcy, and J. Hopkins Stewart, the husband of Mrs. Stewart.

The pleadings and proofs were voluminous ; but it is deemed sufficient for understanding the legal propositions involved, to state in brief terms, the material facts as ascertained by the court upon deciding the cause.

Burrell was the trustee of Mrs. Stewart in her marriage settlement, with ample powers of investment and disposal. Mr. Stewart had no interest in the separate estate, either present or contingent.

William Pine, on the 17th of September, 1841, being possessed of a lease from the executors of John T. Irving, of certain premises at the corner of Nassau and Pine streets, which at a considerable outlay for fixtures, furniture, &c., he had fitted up for a refectory on an extensive scale ; sold and conveyed to Burrell as trustee, an undivided fourth part of the refectory with the lease, fixtures, stock, furniture, &c., receiving therefor \$2000. From that time till December 10th, 1842, he conducted the refectory for the account of himself and Burrell, being allowed one-eighth of the profits for defraying expenses, including the rent, which he agreed to pay ; and Burrell received one-eighth of the profits, as the income on his investment. On the 10th of September, 1842, Pine mortgaged an undivided half of the premises, with the fixtures, &c., to McKean to secure \$1900 ; and on the 1st of October ensuing, he gave a like mortgage of \$2300 to Marcus Bull on his remaining one-fourth.

On the 9th of December, 1842, the rent being largely in arrear, and distress warrants therefor having been issued against Pine, which if carried to a sale, would break up the refectory, destroy the good will of the concern, and by divesting the fixtures, greatly depreciate their value ; Bull and McKean called on Pine, and in the absence of Burrell and his agent, induced Pine to put them in full possession of the refectory, on their agreeing to pay the rent in arrear, and subject to Burrell's right. Bull and McKean at once employed an agent to carry on the business, and

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on the 10th of December, Burrell's agent assented to their acts ; it being provided that he should continue to receive one-fourth of the net profits, and should refund to them one-fourth of the arrears of rent.

Instead of discharging the rent, Bull and McKean suffered the landlords to proceed to a sale on the distress warrant. All the stock, fixtures, &c., except the marble floor, were sold, and by previous arrangement between them, McKean bid off the property for his own and Bull's benefit. The latter paid \$550, and McKean \$300, to the officer making the sale. From that time they conducted the business, excluding Burrell from the same. They however offered to his agent, at or about the time of the sale, to allow him to participate, if he would pay his proportion by a day then fixed by them, which he did not comply with.

Pine's lease terminated May 1, 1843, in anticipation of which, it was agreed between Bull, McKean and Burrell's agent, before the sale on the distress, that they should obtain a renewal of the lease for their joint benefit proportionate to their respective interests, and that Bull should negotiate therefor with Mr. Irving's executors. Bull negotiated accordingly, and obtained the executor's assent to terms by which the rent in the new lease would be \$1000 a year less than in the current lease, and a reduction was to be made for the unexpired term of the latter. But on the excuse that he would not make himself responsible for the whole rent, (which was not communicated either to McKean or Burrell,) Bull made the arrangement for the renewal in his own name, and obtained from Irving's executors, a minute of its terms, on which he acted in his subsequent sale, claiming the whole interest in the new term.

On the 23d of March, 1843, Bull sold all his interest in the lease, refectory, &c., together with the right to the renewal of the lease, to Burke for about \$2400, and on the 28th of March, McKean sold to Burke his interest in the refectory, &c., and all appertaining, for about \$2700. On the following day, Bull and McKean put Burke into the possession of the entire property, who continued therein until long after the old lease expired, and who obtained a renewal of the same under the agreement made by

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Bull with the landlords. Burke had notice of Burrell's rights and claims before paying the purchase money.

Pine was discharged under the bankrupt law.

The bill claimed an account of the property and of the rents and profits from Burke, Bull and McKean, and payment of the value of Burrell's one-fourth of the refectory and its fitments, the good will of the concern, and the interest in the lease and renewal.

The answers of Bull and McKean denied the agreement to pay the arrears of rent, insisted that Burrell's interest was terminated by the sale under the distress warrants; and Bull alleged that there never was any valid or binding agreement for the renewal of the lease.

T. Hastings and Edward Sandford, for the complainant.

A. P. Man, for the defendant, Bull.

R. Lockwood, for H. S. McKean.

M. K. Burke, in person.

B. W. Bonney, for Waddell, the general assignee.

Messrs. *Hastings and Sandford*, for the complainants:

I. The testimony of J. H. Stewart, the husband of the complainant, L. M. Stewart, in the peculiar circumstances of this case, is competent for the purposes for which it was produced.

It can only be objected to on one or more of the following grounds: 1. Identity of interest between husband and wife; 2. A supposed conjugal bias; and 3. On the ground of public policy.

1. In this case there is no identity of interest whatever. The husband has no pretence of interest. The legal presumption of interest arising from the marriage, is fully rebutted by the marriage settlement and the testimony.

2. The objection on the ground of a supposed conjugal bias, goes to the credibility, and not to the competency.

3. The question of public policy, as a reason for the rule of exclusion, is far more intricate.

(a) In some of the earlier English cases, the rule of exclusion is laid down very broadly, that neither a husband or wife can testify either for or against each other. (1 Phil. Ev. 81, 82; 4 Term Rep. 678.)

(b) Yet the rule of exclusion even in England, has been most essentially modified.

In a collateral suit between third parties, husband and wife may be called to contradict each other. (1 Phil. Ev. 79, 80.)

So the wife may testify against the husband, for an act of violence to her person.

On trial of the husband for a forcible marriage, the wife was admitted to prove a voluntary elopement. (McNally's Ev. 181; 2 Hawk. P. C. 46, § 76.)

In our own courts, see 1 Hill, 63; 2 Hill, 181.

(c) The rule deduced from the English cases is undoubtedly as laid down by Starkie. (2 Starkie's Ev. 399.)

"The husband and wife cannot be witnesses *for each other*, for their interests are identical; *nor against each other*, on the grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury." (References to 2 Hawk. P. C. 46; 2 Hale, 279; 2 Str. 1095; Co. Litt. 6, 112, 187; 2 Vern. 79; Greenleaf's Buller, 286. See also 11 Mass. 288.)

By the rule thus laid down—which is the only rational one—Stewart's interest being destroyed, he is admissible *for his wife*. He is not called *against her*.

(d) The rule is still further relaxed by American authorities.

"Though the rule of exclusion may still exist to some purposes here, it ought very readily be made to yield to those cases which are exceptions to its application." (10 J. R. 37, 44.)

In the case of *Barry v. Mercein*, Chancellor Walworth says: "Whenever, therefore, the policy or necessity of admitting her, (the wife,) as a witness against the husband is sufficiently strong to overbalance the principles of public policy upon which the general rule of exclusion is based, she ought to be received as a witness, if she has no interest adverse to his." The Chancellor

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cites *Monroe v. Twistleton*, Norris's Peake App. 24 ; Swin. Just. Rep. 291 ; Syme's Just. Rep. 152.

The case of *Fenner v. Lewis*, (10 J. R. 37, 44,) already cited, treats the rule as one that must yield to circumstances. See also 11 Mass. 288.

In the case of *Richardson v. Learned et al.* (10 Pickering's Rep. 260, 269,) which was the case of an attachment suit by the wife and her trustee against their agent, the husband was sworn as a witness *for the wife*. Putnam, Justice, says : "The testimony of the husband was properly received. The recovery will not alter or affect his legal rights. It is altogether contingent whether the wife will make any appointment in his favor after the money shall have been recovered by the plaintiff, and without such new appointment the husband cannot touch the property."

(e) Stewart was the agent of the trust estate, and his testimony was therefore admissible on that ground. (1 Cowen & Hill, p. 96 to 98 ; 1 Hayw. 372, *Curtis v. Ingham* ; 2 Vernon Rep. 289 ; Addison's Rep. 316, 319 ; 10 J. R. 37, 44 ; Strange, 527.)

II. The testimony of William Pine, objected to on the ground of interest, is competent ; because,

1. He can derive no benefit from this suit whatever. Admitting that he has a claim against the defendants, Bull and McKean, it cannot in any way be drawn in question in this case.

2. His interest, if he has any, is at least equally balanced. He made an absolute sale to Burrell, and his interest now lies in qualifying that sale, so as to leave as much as possible in the hands of Bull and McKean, who are alone responsible to him. He is in fact called against his interest. If he sustains any loss, it is by Bull and McKean, the mortgagees in possession, and not by complainant.

3. A decree in bankruptcy has passed against him, and all his interest is absolutely vested in the defendant Waddell, his assignee, who is a party to this suit.

4. Neither Pine, nor his assignee, can make any claim either *under* or *against* the complainants. If either of them has any claim it is of course subject to the right of the complainants to

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compensation for their one-fourth, and consists only in the right of redemption for the other three-fourths held by McKean and Bull.

III. The testimony of Burke, objected to on the ground of interest, is clearly competent.

1. He bought of Bull and McKean, and is therefore interested in maintaining their title adverse to complainants. He is called by complainants against his interest.

2. No decree can in this cause be made to promote his interest. If he should be made liable to complainants as the holder of the property with notice; still he bought the title of Bull and McKean, and he has his remedy over against them. But his testimony cannot form the basis of a decree for his benefit.

IV. When Bull and McKean made their respective loans to Pine, they knew that the complainants were the absolute owners of an undivided fourth of the lease for years then unexpired, and also of the fixtures and personal property on the premises; and that Pine, the owner of the other three-fourths, had covenanted in consideration of retaining one-eighth of the profits—that is half of complainant's legitimate profits—to pay the whole of the accruing rent; which was a covenant running with the lease if not with the personalty, so far at least as parties and privies are concerned; and when they came into possession of the other three-fourths, as mortgagees in possession, they held subject to Pine's covenant to pay rent, &c., as they derived the advantage of the covenant, a release of one-eighth of the profits, and by suffering the complainant's title to be defeated by their negligence, while in possession, they are at least liable in equity for the amount received by them on their sale to Burke, especially as that amount was procured by taking advantage of their own wrong.

1. Suppose this property, prior to defendant's mortgages, had been seized and sold under a landlord's warrant, would not the complainants have been fully paid out of the surplus, before Pine could have received any thing?

2. As Bull and McKean took possession of their three-fourths under an express agreement with Pine, to protect complainant's interests, as testified to by Pine, they ought not to be permitted

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to gain an advantage which he could not have gained. The yielding of possession to them by Pine, was a good consideration for their agreement to him, especially as connected with the advantage of the enjoyment of one-half of complainant's profits as released by their covenant. Else it would work a gross fraud upon him, and upon the complainants.

V. If the defendants, Bull and McKean, are to be regarded as absolute purchasers of their three-fourths; then, as they took under a full notice of complainant's rights under the covenant with Pine, without affording complainants any opportunity to object, either as to the making of the mortgages, or as to the surrender of the possession, they were equitably bound, even in the absence of the agreement, to provide for the accruing rent out of the fund provided by Pine for that purpose, to wit: one-eighth of the profits relinquished to him by the complainants, and his three-fourths. The defendants having by their neglect suffered the personalty to be sold in bad faith, and procured and disposed of the new lease for their exclusive advantage, they are equitably chargeable with the whole amount of the complainant's claim and reasonable interest, or profits.

VI. By their agreement at and about the time of the surrender, taking possession, as they did, under full notice of complainant's equities, the defendants, Bull and McKean, placed themselves in a relation to the complainants of a strictly fiduciary character. They will not, therefore, be permitted to advantage themselves by a breach of faith, and must account for at least that advantage, as well as for the consequences of their violated faith, even if the agreement itself should be deemed to be void under the statute of frauds. They have derived an advantage by violating a trust reposed in them by complainants, and if necessary to the ends of justice, they may be charged as trustees.

VII. But the agreement of Bull to pay rent, to reduce rent, and to procure a new lease for the joint benefit of himself, McKean, and the complainants, connected as it was with their several interests in the subject matter, and with the release to him by McKean of one-eighth of the entire three-fourths as a consideration therefor, was a legal and binding agreement upon

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Bull without being reduced to writing. He at any rate must account.

VIII. By the agreement of the 9th and 10th of December, 1842, the defendants, Bull and McKean, and the complainants became partners, and the new lease, as well as the property purchased at the landlord's sale, enured to the benefit of all; and the defendants having disposed of the whole for their own benefit, must now account with complainants for the property and for the profits which might have accrued, but for their mismanagement. (Story on Part. 619, 629, and notes; *Pickering v. Bolles*, 1 Bro. C. C. 197; 17 Vesey, 298, 305, 311; 1 Ball & B. 29, 46, 47; 1 *ibid.* 409, 417, *Mulvany v. Dillon*.)

IX. The defendant Burke, having purchased the property with his eyes open, and after full notice, got no title, as against the complainants; and he must therefore account.

Mr. Man, for the defendant Bull, made the following points:

I. Stewart is incompetent as a witness for the complainant. (2 Kent's Com. 178, 179, note *d.*; Gresley's Eq. Ev. 246; 5 Russell, 19; 2 Fonbl. Eq. 457, note; 1 Bl. Com. 443; 1 Burrow's R. 443; 2 Stark. Ev. 400, 708; 7 J. J. Marsh. 263; 6 Binney, 483; 1 Phill. Ev. 76, 82; 8 Paige, 49, 50; 2 Cow. & Hill's Notes, 1556; 7 Johns. Ch. R. 229, 245, 247; 1 Ry. & M. 352; 4 T. R. 678.)

II. Pine and Burke are also incompetent as witnesses for the complainants. (5 Paige, 638; 1 Barb. Ch. Pr. 259.)

III. The complainants cannot have a decree against Bull, because by examining Burke, who, or whose property, is primarily liable, they have discharged both him and Bull so far as the present suit is concerned. (*Bradley v. Root*, 5 Paige, 632, 636, 637; *Thompson v. Harrison*, 1 Cox, 344; 1 Barb. Ch. Pr. 258, and cases there cited; *Bernall v. Donegal*, 3 Dow's P. C. 133, 150; *Meadbury v. Isdall*, 9 Mod. 438; Ambler, 878.)

Burke and his property being discharged, no decree can be made in this suit, which will not be inconsistent with the case made by the bill. (*Colton v. Ross*, 2 Paige, 396; Story's Eq. Pleadings, § 42; 1 Barb. Ch. Pr. 37; Mitford's Pleadings, 38 and 39, and cases there cited; 2 Peter's R. 595, 612.)

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IV. The landlord's sale divested Stewart's, (or Burrell's) rights in the fixtures, furniture, &c., and vested the title in McKean, and through him in Bull. Complainants are bound by Stewart's acts and defaults.

V. The statute of frauds is an entire bar, so far as the claim to the present lease is concerned. The pretended agreement for procuring and sharing in a lease was void by the statute; and the pretended agreement between Bull and Irving for a lease was also void by the same statute. (2 R. S. 134, § 8, and compare sections 6 and 7; 1 R. L. p. 78, §§ 9 to 14; Notes of Revisers, 3 R. S. 655; Story's Eq. Jur. § 563, 566, note, 768; 2 Paige, 181; 4 *ibid.* 197; 2 P. Will. 620; 2 Atkyns, 150; 1 Fonbl. Eq. B. 1, ch. 3, § 8.)

VI. The doctrine of resulting trusts, or trusts raised by operation of law, does not apply to the present case. (1 Hilliard's Abridg. p. 214, §§ 31 and 32, and cases, viz: 1 Vernon, 276; 5 J. C. R. 388; 2 *ibid.* 409; 2 Atkyns, 71; 4 Bibb, 102; 2 Story's Eq. § 768.)

Mr. *Lockwood*, for McKean, urged substantially, the same grounds; and cited in addition, *German v. Machin*, 6 Paige, 288, and 1 Barb. Pr. 258.

THE ASSISTANT VICE-CHANCELLOR.—The defendants move to suppress the deposition of Mr. Stewart, who was sworn as a witness for his wife. He has no interest in the event of the suit, and the objection of bias does not go to his competency.

But on the ground of public policy, I think he was an incompetent witness.

The complainants relied upon the case of *Richardson v. Learned*, (10 Pick. 261,) where the Supreme Court of Massachusetts held the husband to be a competent witness for the trustee of the wife in an action for a part of her separate estate. The conclusion was deduced from the fact that the husband had no interest in the event of the suit, without adverting to the effect of the principle upon the married relation. On the other hand, in *Snyder's Lessee v. Snyder*, (6 Binney, 483,) the Supreme Court of Pennsylvania came to an opposite conclusion,

reposing their opinion upon what appears to be the true ground, public policy.

In *Hopkins v. Smith*, (7 J. J. Marsh. 263,) the Court of Appeals in Kentucky decided that the husband, although not interested, could not be a witness for the wife's trustee in an action of trover for a part of her property.

In England, the only case admitting such testimony, is *Burridge v. Winter*, (1 C. & P. 364,) at Nisi Prius, before Abbott, Ch. J. That case was contrary to *Monroe v. Twistleton*, (Peake's Ev. by Norris, 248, and Appendix, 29,) previously decided by Lord Alvanley, and to *Doker v. Hasler*, (R. & M. 198,) decided by Best, Ch. J., the same year that *Burridge v. Winter* was tried. And the latter case was expressly overruled in *O'Connor v. Majoribanks*, in the C. P., Trin. T. 1842, and the rule established, on consideration, that husband and wife should not be witnesses either for or against each other in civil cases; and that without regard to the circumstance whether the fact came to them confidentially or otherwise, neither could be permitted, even after the marriage terminated, to testify concerning what transpired between them during the marriage, or came to their knowledge by reason of the relation of husband and wife; (6 Lond. Jur. Rep. 509; 5 Scott's New Rep. 394.) This accords with the Chancellor's view of the true reason of the exclusion, as stated in *The People, ex rel. Barry v. Mercein*, (8 Paige's R. 50,) and which I feel bound to adopt. The Supreme Court go upon the ground of confidential communications in *Ratcliff v. Wales*, (1 Hill, 63,) and *Babcock v. Booth*, (2 ibid. 181.) The authorities are decidedly against the competency of the witness, and his deposition must be suppressed. And see farther on this point, Greenleaf's Ev. 384, *et succ.*, § 334, &c.(a)

The testimony of William Pine is objected to on the ground

(a) In *Langley v. Fisher*, the Chancellor of England, April 10, 1845, held, affirming the decision of the Master of the Rolls, that a husband could not be compelled to testify against his wife in a suit affecting her separate estate. Reported before the Chancellor in 9 Lond. Jur. Rep. 837, and 14 Law Journal, N. S. Chy. 102; before the M. R., 7 Lond. Jur. Rep. 164, and 15 Law Journal, Chy. 73.

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of interest. It is said he was liable to pay the rent as between himself and Burrell, and a decree in favor of Burrell will satisfy that liability.

If that be the result, I think his interest is balanced. There is nothing to prevent Bull and McKean from suing him upon their respective mortgage debts, for whatever sum they were compelled to pay by reason of the fourth of the rent in arrear when they took possession. The amount applicable to the reduction of their mortgage debts, is diminished by the amount of such rent then chargeable on the property surrendered; and although their mortgages were upon three-fourths only of the stock and fixtures, yet their rights and interests as occupants of the premises, were affected by the entire rent in arrear. The answers show that when they contemplated paying the arrears, it was the whole, and not three-fourth parts, that they designed to pay. Thus it seems that Pine was liable to the defendants, (and so remained when he testified,) and if the result of this suit should cause them to pay the one-fourth of the rent which was in arrear on Burrell's one-fourth of the lease, it will not exonerate Pine from answering over to them in respect of the thereby increased deficiency upon his mortgage debt.

There is another ground which is decisive of this question. The allegations in the bill would be a complete defence to Pine in any action brought by Burrell for his omission to pay the rent. The bill shows that Burrell ratified and adopted Pine's surrender to the defendants, and accepted their engagement to pay the rent. This was a satisfaction of Pine's liability in that respect.

The defendant Bull moved to suppress the re-examination of W. Pine on the 25th of October, 1844; because his examination had been closed, and was then resumed upon the same matters. The first objection taken before the examiner fails because the ground of the objection was not stated. When the objection is taken at folio 240, the ground is stated, and the question and answer on that folio must be suppressed.

There is also a motion to suppress the testimony of Burke, because he is a party defendant, and it is said is primarily liable for the claim made by the bill. As to the former objection, the fact does not appear on this motion that a replication was filed

to his answer. Hence his being a party, is not of itself a ground for excluding his testimony. As to his interest, he was not liable at all to the complainant in equity, unless he bought with notice of the rights stated in the bill. If he did buy with such notice, he became a participant in the fraud which the bill charges upon Bull and McKean. For such fraudulent conduct, the complainant could recover against the latter alone, or against them and Burke also. If he chose to omit Burke, and should recover against the others, there would be no contribution due from Burke to them. And a recovery against them, without satisfaction, would not prevent a recourse to him. Thus Burke has no interest which makes him incompetent. He may have a bias, strong in proportion to the probability of the complainants proving notice against him, conjoined with the prospect of their obtaining full satisfaction upon a decree against Bull and McKean.

The point that Burke was primarily liable, was urged against any decree being made at all, as well as against the competency of his testimony.

The only liability of his which can be so considered, is for an account of the profits subsequent to the time when he took possession of the refectory. This account is doubtless waived by the complainants using him as a witness.

In respect of the account claimed after the sale on the landlord's warrant and before Burke took possession, he has no interest whatever. And in respect of the claim for an account of the sale of the stock, fixtures, possession and lease to Burke; the parties who made the sale and received the proceeds of it are primarily accountable on the case made by the bill. It would be very hard if Burke should be held accountable before those who obtained his money by the alleged fraud upon the complainants.

Upon the merits of this case, I have had no difficulty, notwithstanding the elaborate and ingenious argument of the counsel for Bull.

The testimony establishes that Bull and McKean, for the consideration of obtaining the immediate possession of the refectory, agreed to pay the rent then in arrear. Whether one-fourth of it

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was to be refunded by Burrell, is not material to this part of the inquiry, and I will omit it for the present.

The motives for the agreement were obvious and pressing. The refectory in operation was then deemed a valuable property. The stock, fixtures, &c., separated from the refectory, the lease and the good will, were worth far less than their mortgages. Those mortgages entitled them to take the stock and fixtures, but they could not have obtained possession of the leasehold, without Pine's consent, till about the end of the current lease. Thus a divesting and sale of the movables, whether by the distress warrants, or on their own mortgages, would have broken up the refectory, and resulted in the certain loss of a large portion of their debts. Pine was in the exclusive possession, but he possessed one-fourth of it for Burrell, its absolute owner.

In the absence of Burrell and his agent, being pressed by Bull and McKean to put them in possession, he made the agreement, by which he in effect relinquished to them his equity of redemption in the three-fourths of the lease, and delivered up to them the entire possession and the good will of the refectory; and by which they agreed to pay the rent and to protect Burrell's interests. That the delivery of possession on the evening of the 9th of December, was entire and complete, is shown by the fact that Pine never after had any charge there; and Bull and McKean placed Thompson in charge, who proceeded before Stewart returned, as having charge not of three undivided fourths, but of the whole establishment.

Stewart's resuming possession of the one-fourth, the ensuing day on his return, by proceeding to the premises, asserting Burrell's right, and assenting to Thompson's agency; did not alter or change the terms on which the parties had been let into possession. By those terms they were bound to respect Burrell's interest, precisely as they and Thompson were, after Stewart's assent to what had been done.

The statute of frauds has no application to this agreement. Instead of its performance of necessity being postponed more than a year, it was necessarily to be performed immediately.

Both the answers, although they deny the agreement, show that Bull at least intended to pay the rent. And looking at the

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fact that Mr. Irving issued the distress warrants in consequence of information from Bull ; the agreement to pay the rent, thereby acquiring possession, and the subsequent omission to pay it ; there is certainly good reason to suspect Bull of a design to defraud both Pine and the complainants.

But it is unnecessary for the complainants to show any fraudulent intent. It suffices that there was a valid agreement made for their benefit on which they had a right to rely ; by the violation of which the defendants became nominally the exclusive owners of the whole establishment except the lease of the building ; and upon the strength of such ownership they excluded the complainants from the whole, including the lease. They did not pay the rent ; the necessary consequence was a sale under the distress warrants, and they became the purchasers, and continued the business.

Now, it makes no difference whether Burrell, by their subsequent understanding with Stewart on the 10th of December, was to bear a fourth of the arrears or not. They were to pay the arrears in the first instance. Until they paid the rent, they had no claim on Burrell for the fourth part, if there were such an agreement. And as they did not pay the arrears, Burrell was never in default for not refunding. Much was said of the inadequacy of the value of the stock, fixtures, &c., to constitute any inducement to Bull and McKean for the alleged agreement to pay the rent. I cannot discover any inadequacy. Pine estimated the establishment as worth \$10,000. In March following McKean sold his share to Burke for \$2500, and Bull obtained for his, including the good will of the new lease, \$2350.

The sale having resulted from Bull and McKean's violation of their engagement and of their duty to Burrell, it did not alter or affect the rights of Burrell as between him and them. He continued in equity the owner of the fourth part of the stock, fixtures, &c., until the sale of the same to Burke. (So far as Burke is concerned, Burrell ratifies that sale by waiving a decree against him.)

The complainants are therefore entitled to an account of the profits of the concern from the 19th of December, 1842, until Burke took possession, and to a decree for such profits, and for

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one-fourth of the sums obtained from Burke on the sale to him in respect of the stock, fixtures, furniture, &c., and the possession of the premises. Although Bull did not convey the complainant's fourth of the subsisting lease by name, yet he did convey the possession expressly, and he and McKean gave possession of the whole to Burke. The lease was then within five weeks of its determination; and the defendants in effect assumed to clothe Burke with the whole right to the premises. They should therefore account for the price obtained, as if they had actually transferred the entire lease.

The complainants having used the testimony of Burke, I think it establishes against them the position that their agent, Stewart, agreed to refund to Bull and McKean one-fourth of the arrears of rent which they were to pay on taking possession.

The accounting will accordingly provide for this, and it must proceed upon the basis of the reduced rent paid to the landlords during the closing period of the lease.

The remaining question in the cause relates to the renewal of the lease, at a reduced rent, for which Bull contracted with the landlords. It is proved that while Burrell had an acknowledged interest in the current lease with Bull and McKean, it was arranged that Bull should obtain a new lease for their common benefit, on the best terms he could. The other parties intrusted the whole negotiation to him. Bull accordingly negotiated for the renewal, his interest in the premises being known to the landlords, and obtained the promise of the same at a yearly rent \$1000 less than that in the old lease. And after having the terms of renewal settled in writing, not so as to be legally binding on the landlords, but so as to be certain of their accomplishment; he refused to recognize Burrell's right to participate in it, and finally appropriated its benefit to himself, excluding McKean also. I agree with his counsel that no resulting trust arose from this transaction; but I cannot perceive that the statute of frauds has any application, although the whole arrangement was by parol.

It was a transaction by which one of three joint owners of a lease, deputed by his associates to obtain its renewal for the common benefit, and availing himself of his part ownership and his

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connection with the property to obtain such renewal ; procured it in his own name, and attempted to shut out his associates from sharing in its advantages. It is in short, an unmitigated fraud, against which courts of equity have ample jurisdiction to grant relief.

Without citing the authorities at large, I refer to *James v. Dean*, (11 Ves. 383, and 15 *ibid.* 236 ;) *Featherstonhaugh v. Fenwick*, (17 *ibid.* 298 ;) *Pickering v. Vowles*, (1 Bro. C. C. 197 ;) *Mulvany v. Dillon*, (1 B. & Beatt. 409.)^(a)

The defendant Bull must account for the sum received by him, precisely as if the renewed lease had been engaged to Burrell, McKean, and himself, according to their respective interests in the outstanding term.

There must be a decree accordingly, reserving the question of costs and all further directions.

BARD and WETMORE v. CHAMBERLAIN and others.

Under a statement in the bill, that by an act of the legislature of another state, a corporation was created with various powers and duties ; the complainant cannot prove that the charter of such corporation, conferred on it the power to loan money on real estate and to take bonds and mortgages.

Corporations, in this country, owe their existence to the legislative power ; they are created for specific and defined objects and purposes ; and they derive all their powers from their charters. To ascertain their capacity, reference must be had to their acts of incorporation. It cannot be inferred, from the mere fact that they are created bodies politic and corporate.

March 8 ; August 28, 1847.

THIS was a bill to foreclose a mortgage executed August 26th, 1835, by S. Chamberlain and his wife to The American Life Insurance and Trust Company, on lands in the city of Buffalo. The mortgage was assigned to the complainants on the 15th of November, 1842.

(a) See also *Gibbes v. Gibson*, reported *postea* ; and 5 Paige, 268.

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The mortgagees were a corporation created by the legislature of the state of Maryland. The mortgage was made payable at the office of the agency of the company in the city of New York.

The bill set forth the charter of the company in the manner stated in the opinion of the court; and at the hearing, the complainants introduced in evidence, the act of incorporation and the subsequent statutes amending and consolidating the same.

The defendants, S. and H. S. Chamberlain, (the latter owning the equity of redemption,) in their answers insisted that it was not shown that the corporation had power to make the contract set forth in the bill. They also alleged that the mortgage and the whole transaction in regard to it, occurred in the state of New York, that the American Life Insurance and Trust Company exercised franchises and assumed to act as a corporation in this state, keeping an office and making loans; and that the mortgage was void, both for this cause, and because the transactions which led to it, were a violation of the laws of this state, known as the restraining laws.

Testimony was taken at large on the defence set up in the answers, and the principal argument at the hearing was on the points thus presented. This branch of the case is omitted; the decision having turned on the objection to the competency of the corporation to contract.

D. Lord, Jr., for the complainants.

Edward Norton, for the defendants, S. and H. S. Chamberlain.

THE ASSISTANT VICE-CHANCELLOR.—The bond and mortgage in question were executed to The American Life Insurance and Trust Company, on the 26th of August, 1835.

The bill alleges that the mortgagees, by an act of the General Assembly of the state of Maryland, passed at the December session in 1833, were created a body politic and corporate, and as such, various powers were conferred and duties imposed upon them. These powers, the bill states, were altered and modified by several statutes at subsequent sessions, and in December, 1837, an act was passed consolidating the original and supple-

mental acts, and more clearly defining the powers and duties of the company.

The consolidating act is then set forth at large, and by its provisions, the company was clothed with the power to loan money on real estate, and incidentally to take bonds and mortgages.

The bill does not, however, allege either in terms or by implication, that when the mortgage of Chamberlain was executed, these powers were incident to the company.

This omission is made a point by the defendants, who insist that the bill shows no legal capacity in the corporation to make the contracts set up by the complainants, and therefore no valid or binding contract is established. The objection rests wholly upon the frame of the bill. It is a narrow ground upon which to dispose of the cause, but it is one upon which the parties have a right to insist; and if it be well taken, an examination of the graver questions presented at the hearing, is unnecessary.

The only charge in the bill which can be relied upon as setting up the powers exercised in making this contract, is that the company was *created a body politic and corporate*. This it is contended, covers the whole ground, and any restriction in its dealings and powers, must be shown by those alleging its existence.

Although it be true, that a corporation at common law, would as such, have capacity to lend money and take a bond and mortgage; yet in fact all corporations, in this country, owe their existence to legislative power, and are created for specific and defined objects and purposes. They derive all their powers from their charters. By the use of certain general terms, the ordinary capacity of corporations is usually bestowed in these charters, with such limitations and additions as the legislative wisdom has deemed proper. But the capacity, as well as the existence of each, is derived from the act of the legislature, and to that we must refer to ascertain the extent of such capacity.

Chief Justice Marshall says of one of these corporations: "It may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties, only in the manner which that act authorizes." (*Head v. The Providence Insurance Company*, 2 Cranch, 167.)

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And Chief Justice Taney, in *The Bank of Augusta v. Earle*, (13 Peters, 587,) says: "It may be safely assumed that a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done by such officers or agents, and in such manner as the charter authorizes."

In *Runyan v. Lessee of Coster*, (14 Peters, 122,) Judge Thompson said, that a corporation can have no legal existence out of the sovereignty which created it. Its residence in one state is no insuperable objection to its power of contracting in another; but the corporation must show that the law of its creation gave it authority to make such contracts, when it sets up contracts made in a foreign state.

The American Life Insurance and Trust Company, was one of the corporations of the modern school, created for defined objects and with limited purposes. The bill declares that it was created a body politic and corporate, *and as such, various powers and duties* were conferred and imposed upon it. This shows that it was thus defined and limited in 1833; and when the mortgage was executed, so far as the bill discloses, it was a body created by a statute which made it a *body corporate with various powers and duties*.

I cannot under the decisions, undertake to say what those powers and duties were, or to assume that it had capacity to take a bond and mortgage for money lent, or for any other consideration. The bill goes far enough to show that the charter expressed the powers which it conferred, but falls short of informing the court what those powers were.

The objection to the bill appears to be well taken.

It is an objection of form only, which might have been raised by a demurrer, and I feel warranted in retaining the suit, and allowing an amendment of the bill upon terms.

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MARCH v. LUDLUM and others.

Where there is a *dispute*, and one of the parties consults an attorney, solicitor or counsellor on the subject; the communications between such party and his legal adviser are sacred, and the courts will not permit them to be divulged without the client's consent.

There is a *dispute*, when there are conflicting rights in existence, or claims made, to the same property; which, unless abandoned by one party or the other, or arranged amicably, will terminate in litigation.

The privilege is not affected by the circumstance that the client offered no compensation, and the legal adviser did not make or expect to make any charge for his opinion.

It is highly important to the prevention of litigation, and indispensable to the administration of justice after it ensues, that the privilege of free and unreserved communication by parties with their legal advisers, should be preserved inviolate.

The court of chancery cannot set aside a public sale made by an officer who is not acting under the direction of the court, on the ground of the inadequacy of the sum bid by the purchaser, however gross or startling it may appear.

Nor is it a ground for relief against such a sale regularly conducted, that the party chiefly interested in attending upon, or preventing it, was ignorant that it was to take place; even if the property sell for a twentieth part of its value.

A judgment creditor purchased the farm of his debtor, at a sale under the judgment. The farm was worth \$3000, and was subject to a mortgage to the loan commissioners for \$131, executed sixteen years before. The debtor ceased to pay the interest thereon after the sale, upon which the farm was advertised by the commissioners and sold and conveyed to L. a neighbor of the debtor, for \$146. The creditor residing in a distant state, was ignorant of the existence of the mortgage until after the sale, as was his attorney who resided in the county. The sale was advertised according to the commissioners usual practice. The notice was published in a newspaper which had the greatest circulation in the part of the county where the farm was situated and was to be sold, and the notices were posted in the same part of the county. The attorney lived in a different section, where there were three newspapers of a much larger circulation. There were but five or six persons present at the sale. L. went with the debtor to the sale, and was urged by the debtor to buy the farm. After arriving he consented to buy it, and borrowed the money for the purpose at the place of sale. After the sale, he permitted the debtor to occupy the farm, the latter taking a lease. There was no proof that L. bought the farm for the debtor, or that any of the consideration was furnished by the debtor, or that either of them deterred or prevented others from hearing of or attending the sale. On a bill by the creditor to set aside the sale for fraud and unfairness, *held* that the sale was regular, and that it could not be set aside on the facts established. Also *held*, that after the sheriff's sale, there was no re-

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lation of trust or confidence between the debtor and the creditor, nor any duty on the part of the former, which required him to apprise the latter of the impending sale, or precluded him from buying at the sale.

April 14, and May, 5; September 10, 1845.

IN 1825, Ephraim Wilcox, being the owner of a farm of one hundred acres in Romulus, afterwards Varick, in the county of Seneca, mortgaged it to the loan commissioners of that county, to secure the payment of \$131, with interest annually. Isaiah W. Smith, in March, 1831, purchased the farm, subject to the mortgage.

On the 24th day of August, 1840, Enoch C. March, the complainant, recovered and docketed a judgment in the Supreme Court, against Smith with several others, for about \$3000. At this time Smith owned the farm of one hundred acres; together with two other parcels of twenty-five and thirty-seven acres respectively, which two were mortgaged for their value.

On the 10th of April, 1841, these premises were sold by the sheriff, by virtue of an execution issued on the complainant's judgment and were purchased by him for \$3166 68, being the amount of his execution and costs. The premises were not redeemed, and on the 11th day of July, 1842, they were duly conveyed by the sheriff to the complainant.

The interest on the mortgage to the loan commissioners was paid to the year 1840. In May, 1841, a year's interest remaining unpaid, the loan commissioners advertised the farm for sale pursuant to the statute, and sold it accordingly on the 21st day of September, 1841, to Stephen Ludlum, for \$146 65, being the amount of the debt, interest and costs; and on the same day conveyed the farm to Ludlum.

Smith took a lease of the same from Ludlum, and continued in possession.

On the 17th day of November, 1842, the complainant filed the bill in this cause, against Smith, Ludlum, and John Sayre, the loan commissioner who acted in the sale, alleging that the sale was collusive and fraudulent, and praying to redeem the farm on paying to Ludlum the purchase money with interest and

L.'s expenses, or that the farm might be resold under the mortgage.

Among other things, the bill alleged that all the judgment debtors were destitute of property, that the farm was a valuable improved one, with good buildings worth \$3000, and more, and saleable for that sum, and there was no other fund out of which any part of the debt could be realized. That previous to the sheriff's sale, the complainant (who resided at St. Louis in the state of Missouri,) searched in the county clerk's office for incumbrances on the farm, and found none. On renewing the search in February, 1842, he for the first time received information of the existence of the mortgage to the loan commissioners, which he had never before suspected. A further inquiry led, in April 1842, to information of the sale to Ludlum. That on the 11th day of July, 1842, he tendered to Ludlum, the amount of the latter's bid with interest and expenses, which Ludlum refused to receive.

The bill further alleged, that shortly after the sheriff's sale, Smith called on Mr. Sayre and informed him that he, Smith, should no longer pay the interest on the loan mortgage, and wished him to advertise and sell immediately. That the commissioner advertised the premises as having been mortgaged by Wilcox, and the notice was published in the Ovid Bee, a newspaper printed at Ovid, Seneca county; but the complainant is ignorant whether the advertisement was posted any where or not. That the Ovid Bee had a very limited circulation, confined to the vicinity of Ovid. That Seneca is a shire county, the courts being held alternately in the north and south shires. That in the north shire there were three newspapers published, each having a larger circulation than the Ovid paper. That there was no public conveyance from the north to the south shire, and but little inter-communication. That the great public thoroughfare to the West, is through Seneca Falls and Waterloo, towns in the north shire, from whence there is constant and rapid communication through the state. That the complainant's attorney resided in Waterloo, as did the complainant when in that county, which facts were known to the defendants. That the Ovid Bee

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circulated but very little in the north part of the county, and a publication in it would not be likely to be noticed there.

The bill further stated, that the sale was made at the courthouse in Ovid, pursuant to the advertisement. That Smith, Ludlum, and a person called in by them, were the only persons present at the sale. That Ludlum attended the sale for and at the request of Smith, and Smith or his friends furnished to Ludlum, the funds used at the sale or a part thereof, or borrowed the same of him. That the sale was procured by the contrivance of Smith, that Ludlum knew this, and assisted him in preventing publicity and keeping it from the complainant and all others, to enable Smith to buy the premises for himself in Ludlum's name. That divers persons were deterred from attending the sale by assurances from Smith or Ludlum, that the premises were to be bid off by Ludlum for Smith; and since the sale, they or one of them have stated that the purchase was for Smith's benefit who in fact owned the premises, and that the purchase money was loaned of Ludlum. The bill charged that the foreclosure was made at Smith's request, who consulted Sayre as to its mode and effect; that Wilcox's name was inserted to prevent publicity, and to enable Smith to have the premises bought for his benefit for the sum due on the mortgage, and thus to defraud the complainant; and that Ludlum bought the premises with Smith's money and for his benefit. The bill waived the defendants oath to their answer;—but it contained many special interrogatories, which accounts for portions of the answer hereafter stated.

The answer of Smith and Ludlum denied all the fraud, collusion and contrivances charged in the bill. It stated that Smith became insolvent by the failure of a bank in which he was concerned, and all his property was sold on execution in 1840, and early in 1841. He never expected to redeem his farm from the sheriff's sale, and was not able longer to pay the interest on the loan office mortgage. He called on Sayre and informed him that he could not and did not intend to pay the interest; his motive being, to save Sayre, who was an old man, the trouble of calling on him, which he supposed Sayre as an old neighbor and acquaintance, would do. That he did not ask Sayre to advertise or sell, or express to him any wish

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in the matter, or consult with him on the subject; nor was the advertisement made or sale held by his procurement. That Ludlum knew nothing of Smith's interview with Sayre. That the Ovid Bee had a general circulation in the southern and central parts of the county, which has a north and south shire and jury districts; and was the only paper published in the south shire, in which the farm was situated, and was the medium of all legal and other notices required to be published in that part of the county; and was published in the county town for the southern shire. That they were ignorant as to the circulation of the Bee in the north part of the county, and as to the circulation of the newspapers there printed. That four persons besides the defendants, were present at the sale, one of whom was the county clerk whose office was in the court house, and whom Ludlum being in his office, casually asked to go up into the court room. The answer denied that L. attended the sale at Smith's request to buy the farm, or that L. or any one for him furnished the funds for the purchase; or that any persons were deterred by their assurances from attending the sale; or that since the sale they have admitted that the purchase money was loaned of L. Ludlum further answered, that he had heard that the farm was to be sold, but not the day of sale. That he had engaged previously to go on the 21st of September, 1841, (the day of sale,) with H. Swan of Varick, to Lodi, a town next beyond Ovid, on business of Swan's, and was to ride in Swan's carriage. That on the morning of the 21st, Smith rode up to L.'s house and told L. he was going to Ovid to attend the sale of his farm, and hearing L. was going to Lodi, which would take him through Ovid, asked L. to ride with him as far as Ovid, which L. did, as he would otherwise have had to walk to Swan's. That Smith said nothing of any business, or intimated any wish, till after they were on their way, when after recounting his misfortunes, &c., he asked L. if he L. had not better buy the farm; to which L. answered he could not, as he had not the means, and no more was said. After arriving at Ovid, L. seeing few people there, and learning that Barna Van Vleet had come there prepared with money to bid off another piece of land advertised by the loan commissioners, but which he found was not to be sold, and that therefore Van Vleet would lend the

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money to any one who wished to bid off Smith's farm ; applied to Judge Sayre and learned the amount due, and then and not before, resolved to bid on the property. That he did this independent of Smith, without any request from him, and without any promise or expectation that S. or any one for him would repay the amount bid. That L. borrowed the money on his own application, on his own credit, and for his own benefit, without any participation by any one else. That he bid off the farm, paid the money down and received a deed from Sayre. That the purchase was without any consent or understanding, by or with Sayre or any one else ; for L. himself, by his own act, and in his own discretion, and for the benefit of no other person. That when the bill was filed, he was indebted to Barna Van Vleet in \$153, for the money so borrowed, for which the latter held his note, dated the day of the sale but given afterwards, which note L. had paid since. He never called on Smith to repay the money paid at the sale, and had no claim on S. therefor. Smith, in his answer, stated the same facts.

The answer of Sayre set forth the mortgage, and the proceedings on it, to and at the sale and conveyance ; and that the advertisement was in the usual and proper form, detailing it, and was published and posted in the usual manner. That the newspaper selected, had the principal circulation in the shire of the county where the lands advertised were situated, had been published several years, and was generally used for the publication of legal notices in the south jury district. And he indignantly denied every charge and imputation in the bill, of fraud, collusion, consultation, &c. ; stating that he had simply done in the premises what the law required of him, without the least expectation or supposition that a fraud or injury to any person was to be effected thereby.

The cause was heard on pleadings and proofs. The complainant proved by the evidence of his attorney, the searches stated in the bill, and the entire ignorance of both as to the loan office mortgage, till after the sale to Ludlum. H. Swan testified to the arrangement for going to Lodi, and L.'s riding with Smith to Ovid, without at the time giving any explanation. He proved that L. went with him to Lodi, as he had agreed. Mr. Sayre,

examined his co-defendants, testified that on the day of the sale, just before it took place, Smith told him that Ludlum would bid off the farm. It was proved that Barna Van Vleet was at the sale, and that there was no bid but Ludlum's, who at once bid the amount due on the mortgage, including expenses.

James McKnight, for the complainant, testified, that in a conversation with Ludlum after the sale, he understood L. to say that he purchased the farm for Smith.

Mr. Bloomer, an attorney and counsellor at law, was introduced as a witness by the complainant, to prove statements made to him by Smith in the spring of 1842, relative to the loan commissioners' sale. It appeared that Smith, soon after he became Ludlum's tenant, called on Bloomer and consulted him in respect of Ludlum's title being a protection to Smith against the complainant; and the statements offered were made on this occasion.

The defendant's counsel objected to the testimony proposed to be given, on the ground that Smith's communication to Bloomer was privileged, and ought not to be divulged. The complainant insisted on the evidence, and the witness testified at large as to what took place between himself and Smith. When the cause came on to be argued, the defendants moved to suppress the deposition of Bloomer, and after argument upon the question, it was wholly suppressed, as will appear in the decision, *post*. This result makes it unnecessary to insert the testimony.

On the part of the defendants, it was proved that the Ovid Bee, in 1841, had been published for six years, and then had a circulation of 300 to 350, principally in the county of Seneca, and in the southern shire, in which it was the only newspaper. Four or five were taken in Waterloo, and ten or twelve in Seneca Falls. It was the medium of the publication of sheriff's sales, mortgage sales, and other legal notices.

Barna Van Vleet proved the cause of his attendance at the sale, Ludlum's application to him, and his loan of the money, as stated in the answer.

Some other evidence, it will be seen, is adverted to in the opinion of the court.

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O. H. Platt and *J. L. White*, for the complainant, made the following points :

I. The sale under the loan office mortgage, was a fraud as against March. No rule can be made defining the limits of fraud, as each new rule would be followed by a new evasion, (*Jeremy's E. Juris.* 383;) and hence the authority of the court is not circumscribed, and it judges every case upon its own peculiar circumstances, (3 *Bacon's Abridg.* 299.)

Circumstances in this case which are the *indicia* of fraud.

1. John Sayre, the commissioner of loans, Ludlum, Smith, and Hanks, were the only persons present at the sale.

2. Smith and Ludlum were neighbors, they went together, notwithstanding Ludlum's promise to go with Henry Swan on business.

3. Ludlum was the only bidder, and he bid at once the amount of the mortgage.

4. The advertisement of sale was published in the "Ovid Bee," a paper of very limited circulation.

5. Smith continued to occupy the farm.

6. Smith went to the commissioner of loans, (Sayre,) with one Jared Van Vleet, to induce him to sell the farm under the mortgage; distance six miles, and they had no other business.

7. Smith informed Sayre in advance, that Ludlum would bid in the farm, (showing an agreement.)

8. Ludlum borrowed money of Van Vleet's son, who was there when the farm was sold. No note was given.

9. Admission of Smith to Bloomer, that it was fixed to be safe.

10. Admission of Ludlum to McKnight, that he purchased for Smith.

11. The price was grossly inadequate. The farm was worth \$4000; and the amount paid was \$146 65.

II. Where the circumstances of the case, or the situation of the parties, are such as to afford one of them power to take advantage of the other, and the price is grossly inadequate, the court will, at the suit of the injured party, rescind the transaction. (6 *Har. & John.* 435; 13 *Vesey*, 103; 16 *ibid.* 512; 4 *John. Ch. R.* 118, which is in point.) And the reason is, that suspicious cir-

cumstances, combined with inadequacy of price, make in equity, a case of fraud. (Jeremy's Equity, 397.)

III. When under a decree of foreclosure, property is fairly sold to a stranger, mere inadequacy is not sufficient to set aside the sale, unless it be so great as to be evidence of fraud or unfairness in the sale; (9 Paige Ch. R. 259, 261.) A case can scarcely be imagined, where the price could be more inadequate than in this; and *eight* "suspicious circumstances," independent of the relative "situations of the parties," combine with it to make a luminous case of fraud.

IV. The testimony of Jared Van Vleet is impeached not only by itself, but by circumstances detailed by other witnesses.

He was throughout the counsellor of Smith, gave direction to the whole proceeding to defraud the complainant, and his testimony is not to be relied upon.

V. The court have power to set aside the mortgage sale, and to order a re-sale, if fraud or unfairness characterize the first sale, and the complainant has sustained damage thereby, which would otherwise be irreparable.

Edward Sandford, for the defendants, made the following points:

I. The mortgage of Ephraim Wilcox to the commissioners for loaning money in the county of Seneca, was a valid lien upon the premises in question. It was not necessary that such mortgage should be recorded in the clerk's office of that county. The complainant had actual, as well as constructive notice of its existence. (5 Web. & Skin. Laws, 392; Laws of 1808; 1 Rev. Stat. 367, s. 52, 2d ed.)

II. By the non-payment of interest on this mortgage within twenty-two days from the first Tuesday of May, 1841, the loan commissioners became vested with an indefeasible estate in the mortgaged premises, the mortgage became *ipso facto* foreclosed by the default, and no title to the premises remained in the complainant under the sale made by the sheriff to him on the 10th April, 1841. A sale having been made subsequently, on the first of September, 1841, under the act, by the commissioner, no title vested in the complainant under the conveyance made by the

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sheriff to him. (Laws of 1808, p. 367, § 11, § 15; 9 Johns. Rep. 129; 14 J. R. 360; 3 J. C. R. 338.)

III. The sale made by the sheriff to the complainant of the equity of redemption of Smith, conveyed to the complainant all Smith's interest in the mortgaged premises. He was neither legally nor morally bound to keep down the interest upon the prior incumbrances, he had not the means to do it, and the complainant knew his destitute circumstances. (*Prevost v. Gratz*, Peters' C. C. Rep. 378; *Jackson v. Woolsey*, 11 Johns. Rep. 446; *Fish v. Sarbe*, 6 Watts & Serg. 18, 22.)

IV. This court has no jurisdiction to entertain a bill to set aside the proceedings of the commissioner to sell, and in making the sale, on the ground of irregularity. (*Mayor of Brooklyn v. Meserole*, 26 Wend. 132.)

V. The only ground on which the court can entertain the bill is the alleged fraud and conspiracy between Smith, Ludlum and the commissioner, to sell and purchase the premises in question, without the knowledge of the complainant. Such fraud can only consist in the false representation of material facts; or in the designed suppression or concealment of matters from the complainant, which the defendants were bound to have communicated to him; and which misrepresentation or concealment have misled and deceived him to his injury. All fraud is utterly denied, and none is proved. (3 Term Rep. 51; *Pasley v. Freeman*, 6 Ves. Jr. 173, 183.)

VI. There was no fraud upon the complainant in Smith's omitting to pay the interest after the complainant had purchased his property nor in the loan commissioners proceedings to advertise and sell upon the non-payment of the interest according to law. There would have been no fraud upon the complainant had Smith himself become the purchaser at that sale. He owed neither debt nor duty to the complainant, and had the privilege of any other citizen to become a purchaser.

VII. Ludlum was a *bona fide* purchaser, and the complainant is not entitled to redeem from him. But had he purchased for Smith, or with his money, he would be entitled still to hold the premises. The complainant has no title or claim to redeem, nor was there any fraud upon the complainant in his becoming such

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purchaser. (*Sherrill v. Crosby*, 14 Johns. Rep. 358; 4 J. R. 240; 1 R. S. 2d ed. 722, § 51.)

VIII. The fraud charged in the bill as against the complainant, is that notice of the sale was published in the *Ovid Bee*, to keep the complainant in ignorance of the proceeding. The answers deny the allegation of fraud, and the proofs show that this publication was the only one which could properly have been made.

IX. The fraud upon the law charged, that Smith and Ludlum deterred any person from attending and bidding at the sale, is utterly denied in the answers and wholly unsupported by proof.

X. The bill of complaint should be dismissed with costs.

THE ASSISTANT VICE-CHANCELLOR.—Before looking into the merits of this case, I will dispose of the motion to suppress the testimony of D. C. Bloomer. Mr. Bloomer was an attorney and counsellor at law, and Smith went to his office and consulted him, in regard to the probable validity of Ludlum's title against that of March; Smith having taken a lease from Ludlum. The statements of Smith, which are sought to be proved by Bloomer, were drawn out from him by the inquiries which Bloomer made in order to advise him intelligibly. Smith offered no compensation, nor did Bloomer make or expect to make any charge for his opinion. But he was doubtless consulted because he was an attorney or counsellor, and no statement or inquiry would have been addressed to him, except for that cause.

Previous to this time, March had become the purchaser of the farm under his judgment, at a price so near its value, that no one was likely to redeem; and it was morally certain that in July following, March would receive a sheriff's deed of the premises. Ludlum had already acquired an absolute conveyance of the same land, under the loan commissioners' sale. These two titles were hostile to each other, and could scarcely fail to result in a legal collision. Smith was interested in that result, as a tenant under Ludlum, and on the assumption in the bill in this cause, still more interested as a participant in Ludlum's purchase. The bill was filed about eight months after the conversation with Bloomer.

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The decisions, in this country, have been quite conflicting in regard to the extent of the privilege accorded to communications between clients and their legal advisers; and there has been no less disagreement in the courts in England. In this state, it has been held to extend to confidential communications between the attorney and client concerning the matter of the suit, or to which the retainer relates, where a suit is in contemplation. (See *Coveney v. Tannahill*, 1 Hill, 33.) There is no authority however which limits the privilege to the extent just stated.

In England, the tendency of the modern decisions has been to enlarge the privilege, and to carry out the principle upon which it is founded. The recent cases upon the subject are very numerous. I will content myself with a reference to a few of the leading decisions.

In *Walker v. Wildman*, (6 Madd. 47,) a motion was made for the production of letters which had passed between the defendant and her solicitor before the suit, in confidence, *in the usual course of business between a solicitor and client*. Sir John Leach, V. C., refused the motion; holding that the protection extended to every communication made by the client to counsel, or attorney, or solicitor, for professional assistance; and that it was not limited to such as were made pending an action or suit.

In *Vent v. Pacey*, (4 Russell, 193,) a letter which the defendant had written to his solicitor *after the dispute arose*, but before any suit, directing him to take the opinion of counsel upon the question in dispute; was held to be privileged by Lord Lyndhurst, Chancellor, affirming the order of the Vice-Chancellor.

In the previous case of *Hughes v. Biddulph*, (4 *ibid.* 190,) Lord Chancellor Lyndhurst decided that confidential communications between the defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause, *or with reference to it*, though previous to its commencement, ought to be protected.

In *Greenough v. Gaskell*, (1 M. & K. 98,) Lord Brougham, Chancellor, in an able opinion examining the philosophy and true grounds of the privilege, declared his judgment that a solicitor cannot be compelled to disclose matters which have come

to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation; and he affirmed the decision of the Vice-Chancellor which went to the same point.

In his subsequent decision in *Bolton v. The Corporation of Liverpool*, reported in 1 M. & K. 88, Lord Brougham again discussed the principle, and refused to order the production of cases which the defendants had prepared and laid before their counsel, in contemplation of the litigation. And he affirmed the decision of Sir Lancelot Shadwell, V. C., in the same case, (3 Simons, 467.)

In *Nias v. The Northern and Eastern Railway Company*, (2 Kean, 76,) Lord Langdale, Master of the Rolls, who has steadily resisted all extension of the application of the principle of this privilege, almost to the extent of pertinacity; considering himself bound by *Bolton v. The Corporation of Liverpool*, held a case to be privileged which the defendants had laid before their counsel, prior to the suit, but after the matters in dispute had arisen. When the case of *Nias* came before Lord Cottenham on the appeal from Lord Langdale, (3 M. & C. 355,) he expressed in strong terms his approbation of the decision in *Bolton v. The Corporation of Liverpool*, and of the principle upon which the privilege was upheld.

The principle was fully approved also, in *Knight v. Marquis of Waterford*, (2 Y. & C. 22, 30, 36,) by Lord Abinger, who thought however that the court in Bolton's case fell short in applying it to the extent that case called for. Lord Langdale in a prior case, *Storey v. Lord George Lennox*, had commented unfavorably upon Lord Brougham's decision; and the latest instance which I have seen of his ruling on the point, may be found in *Flight v. Robinson*, July 31, 1844; (8 Lond. Jur. R. 888.)^(a)

To recur to the authorities which I proposed to cite, in *Herring v. Cloberry*, (1 Phill. R. 91,) Lord Lyndhurst, held the pri-

(a) Since reported in 8 Beavan, 22.

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privilege to extend to all communications which pass between an attorney and client, in the course of business in which the attorney is employed professionally by the client. And to the same effect is his decision in *Jones v. Pugh*, (1 Phill. R. 96.)

In *Clagett v. Phillips*, (2 Y. & Co. Ch. Cases, 82,) Vice-Chancellor Knight Bruce, decided that where a dispute had arisen between two parties, which might, unless amicably adjusted, terminate in a suit, there if confidential communications with professional men passed in the course of the dispute, they would be privileged if litigation ensued, though litigation might not have been contemplated when the communications took place.

Vice-Chancellor Sir James Wigram, has in several instances had this subject under consideration, and has ably enforced the application of the privilege to all cases falling within its established principles.

In *Lord Walsingham v. Goodricke*, (3 Hare, 122,) written communications were held privileged from production, which passed between the defendant and his solicitor, before any dispute had arisen between the parties to the suit, so far as they contained legal advice or opinions. In that case the letters were written in relation to a sale, while negotiations for the sale and in regard to the title were proceeding, but before the date of the dispute. Wigram, V. C. says, it is now settled, that the communications between a party and his professional adviser may be privileged *where the solicitor is the party interrogated*, although they do not relate to any litigation either commenced or anticipated.

In *Woods v. Woods*, (4 Hare's R. 83 ; S. C. 9 Lond. Jur. Rep. 102, and 615,) the defendant in order to sustain a defence upon the lapse of time and the complainant's acquiescence, filed a cross bill alleging the facts, and that the opposite party, fifteen years before, had taken the opinion of counsel thereupon, and he set forth the alleged case and opinion. The answer of the defendant to the cross bill, admitted that he had taken the opinion of Mr. Bell on his title, (which was the subject of the suit,) about fifteen years before, and that the case and opinion were in his possession ; but he submitted that they were privileged communications between himself and his counsel, and that he was not bound to produce

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them. The production of the opinion was insisted upon, because the case and opinion were prepared and taken, before the dispute in the cause had arisen, and not with reference to any pending or expected litigation. Sir James Wigram, referring to his judgment in *Lord Walsingham v. Goodricke*, refused the motion for the production of the opinion.

Finally in *Holmes v. Baddeley*, (Nov. 25, 1844, 9 Lond. Jur. Rep. 289,)(a) the complainant claimed as sole heir at law of S. H., and the defendants claimed also as her heirs, disputing the legitimacy of the complainant. The bill charged that the defendants had in their possession, cases, opinions, letters, &c., on the subject, which the bill required to be produced. It appeared that soon after S. H.'s death, one A. H. set up a claim as her heir, adverse to the defendants. They thereupon laid two cases before their counsel and obtained opinions, and several letters passed between their solicitors and different persons, respecting their right to the property. The opinions and correspondence were obtained and carried on, in contemplation of legal proceedings against A. H. Some of the letters &c., were written before A. H. made her claim, but after the defendants were apprised of her intention to make it. They contended that the documents were privileged, and so Lord Lyndhurst decided, reversing Lord Langdale's order (reported in 6 Beavan, 521,) made for their production.

These authorities satisfactorily establish that where there is a *dispute*, and one of the parties consults counsel on the subject, the communications between them are sacred, and the courts will not permit them to be divulged without the client's consent.

The opinions of several eminent equity judges go beyond this, and extend the privilege to professional inter-communications in regard to professional business, without reference to any dispute.

And the cases show that there is a dispute, where there are conflicting rights in existence or claims made to the same proper-

(a) Reported subsequently in 1 Phillips, 476. And see a more recent adjudication on the subject, in *Carpmael v. Powis*, before the Master of the Rolls, November 8th, 1845, and before the Chancellor, March 25, 1846; now reported, 1 Phill. R 669, and 15 Law Journal, N. S., Chancery, 275.

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ty, which unless abandoned by one party or the other, or arranged amicably, will terminate in litigation.

The point before me is clearly within these authorities. The dispute was already in existence when the communications were made, and it ripened into a suit in a few months afterwards.

It is highly important to the prevention of litigation, as well as indispensable to the administration of justice after it ensues, that the privilege of free and unreserved communication by parties with their legal advisers, should be preserved inviolate. And I have no hesitation in adopting the principle of the equity cases which I have cited, in its application to the testimony of Bloomer.

The motion to suppress his deposition is granted.

Next, in regard to the merits of the cause. The case is one of very great hardship for the complainant, if it be remediless ; a hardship against which the court would fain grant relief, if consistent with established principles of law, and with rules of property which are important to be preserved.

The bill makes no specific charge of *irregularity*, in the sale by the loan commissioner. It alleges the complainant's ignorance as to the posting of the notices required by law, and asks a discovery on that point. But it is plain that error or irregularity was not intended to be alleged as a ground for setting aside the sale ; and I may dismiss that subject by saying that there is no irregularity established.

The gravamen of the bill is, that there was a gross and startling inadequacy in the sum bid at the sale ; and that the sale itself, the price bid, and the purchase by Ludlum, were the result of a contrivance between Smith and Ludlum, aided by the collusion of Mr. Sayre, the loan commissioner, and designed to defraud the complainant for Smith's benefit.

To examine these allegations in detail. 1. As to the inadequacy. This is unquestionably very great, for the property sold for less than one-twentieth of its value.

But I do not understand that the court of chancery, can on this ground alone, set aside a public sale made by an officer who is not acting under the direction of the court. Instances of greater inadequacy, are of constant occurrence in sales for taxes

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and assessments, made by our state and municipal authorities. The exercise of such a jurisdiction, would, I imagine, be more startling to the public mind, than any supposable inadequacy of price, would be to the mind of the court. Over judicial sales, made by its own officers, the court of chancery has always exercised a summary control, by motion or petition. But even in those cases, the court will not interfere, on the ground of inadequacy alone. (*American Insurance Company v. Oakley*, 9 Paige, 259; *Brown v. Frost*, 10 *ibid.* 243; *Tripp v. Cook*, 26 Wend. 143, 156, 159.) There must be some surprise, accident, fraud, or similar cause, other than the neglect of the party interested, or his inability to raise the money; to induce an order for a re-sale when the sale has been made by its own officers, and under its own process or decrees. Under any other rule, confidence in such sales would be entirely dissipated, and the final result would be, that creditors would become the purchasers upon their own terms. (And see 1 Story's Eq. Jur. § 245.)

The point of inadequacy was urged in connection with the other facts, as evidencing fraud; and I will recur to it in that connection. Standing by itself, it furnishes no ground for relief. Before considering the circumstances of this sale, I will advert to the statute under which it was made. It is to be found in the Session Laws of 1808, chap. 216; (5 Vol. Laws, Webster's ed. 392.) By the 15th section, if any borrower neglected for twenty-two days after the first Tuesday in May in any year, to pay the yearly interest to the commissioners, they became seised of an absolute, indefeasible estate in the lands mortgaged to them, and the mortgagor, his heirs and assigns were foreclosed of all equity of redemption therein. Within eight days after they became thus seised, the commissioners, by section 16, were required to advertise the lands to be sold on the third Tuesday of September ensuing. On that day, the statute required them to expose such lands for sale at public vendue, and to convey them to the highest bidder, who thereby acquired an absolute title to the same. If no one bid as much as remained unpaid on the mortgage, the commissioners were to take possession of the lands for the benefit of the state.

2. Having these enactments in view, there is no pretence upon

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the evidence, to charge Mr. Sayre with collusion or connivance with the other parties. It was his imperative duty to advertise the land, on the non-payment of the interest. Whether Smith begged him to do this, or to omit it, he had no discretion to pursue any other course. He advertised it in the manner which had been his custom, for more than thirty years that he had acted as commissioner; he selected the newspaper and the places for posting the notices, which were the most likely to give general notice in the vicinity of the lands advertised; and he made this selection, without any concert or consultation with the other parties, and without their knowledge. The cases of *King v. Stone*, (6 J. C. R. 322,) and *Jackson, ex dem. Warden, v. Harris*, (3 Cowen, 241,) show that the publication and posting of the notice of sale are sufficient.

When the day of sale arrived, he made the sale in the accustomed place, the court room in the court house. He had no right to adjourn the sale, or to refuse Ludlum's bid, and if he had declined to execute a deed to Ludlum, the Supreme Court would have compelled him to do it.

He knew nothing of the complainant's interest in the matter, and he simply discharged his duty as a public officer, without turning to the right hand or to the left.

3. The next inquiry is into the fraud and contrivance of Smith and Ludlum; and in pursuing it, I will take up the circumstances on which the complainant relies, in the order of time.

The first was Smith's going to Mr. Sayre, to tell him that he should not pay the interest any longer, and requesting Sayre to advertise and sell immediately. There is no proof of any of this charge, except that Smith went to Mr. Sayre and told him the farm had been sold, and he, Smith, should not pay the interest. This is urged as a suspicious proceeding. If it could have accelerated the sale, or in any manner influenced it, the visit to the commissioner might have been deemed singular; but it could not and did not have the slightest effect. The statute was the inflexible guide of the commissioner. Mr. Sayre says, that he would probably have notified Smith before proceeding to advertise; and Smith's explanation that he went to save Mr. Sayre from that trouble, is the most probable that has been suggested.

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The next *indicia* of fraud relied upon, are found in the manner of advertising the sale. As this was the act of the loan commissioner, without any participation or even knowledge, on the part of either Smith or Ludlum, it is not imputable as a fraud to them. I have already expressed my opinion that the mode of publishing and posting the notice of sale, was proper and sufficient.

Next in order, is the fact that Ludlum rode to the place of sale with Smith. It certainly is not surprising that Smith should go to the sale, or that he should prefer to have his farm bought by a neighbor, to having it fall into the hands of an entire stranger. Nor is it to be doubted, that he hoped and expected, if a neighbor did buy it for a small sum, that he would at some day be permitted to purchase it back on moderate terms. In this, he neither hoped or expressed any thing improper, and he went to the sale as every bidder does who attends an auction, with a desire to obtain a cheap or advantageous bargain; which precisely as it equals his expectations, redounds to the disadvantage and loss of others interested in the subject matter of the sale. Instead of this being deemed wrong or improper, the law regards it as fair, and rather to be encouraged, so long as there is no combination to prevent competition, or other fraudulent practice respecting the sale.

Smith had no interest to prevent the sale of the farm. His title to it was effectually divested by the sheriff's sale; not that the time for redemption had expired, but the bid was nearly or quite equal to its value, and he was insolvent and had no means with which to redeem.

It was not his duty, as between him and the complainant, to pay the interest; (*Russell v. Allen*, 10 Paige, 249, 255.) And he was under no greater obligation to notify the complainant of the impending sale on the mortgage, than any one who intended bidding at a master's sale would be bound to notify a person having an interest in the property, whose attendance at the sale might interfere with his proposed speculation.

In short, Smith's attitude towards that of the complainant was not that of duty, trust or confidence. He stood at arms length. The complainant had satisfied his debt by the sale of the farm.

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The farm was in effect his, and Smith had as perfect a right to buy it in on an old mortgage, as he had to buy any farm of the complainant's in which he never had an interest.

It is to be observed too, that there is no evidence of Ludlum's having any idea whatever of buying the property or even attending the sale, until the morning it took place. On the contrary, his answer to the bill in this respect, is that he entertained no such intention. The ride to Ovid furnished an opportunity to concoct a conspiracy; but there had been abundant time for that purpose three months before, if any were in view. The mere fact of riding in the wagon with Smith, instead of riding to the same place with Swan, if it proves any thing of the conspiracy, proves that Smith had not previously arranged it. If the matter had been understood before, Ludlum would naturally have gone with Swan. But the circumstance is fairly explained. Ludlum had an engagement for Swan, which would take him through Ovid; made without any reference to the sale. He was to go with Swan, but Smith came by his house with a wagon, and Ludlum instead of walking a mile to get into Swan's wagon, took a seat with Smith, and rode all the way to Ovid. It was not quite so near a route for Smith to go by Ludlum's, and it is probable he went that way in order to urge Ludlum to attend the sale and buy; for it is conceded that he did so urge him while on the way. It is alleged that Ludlum then agreed to buy, and to buy for Smith's benefit. Both facts are positively denied, and there is no evidence against the answer. Nor is there any proof that Ludlum made up his mind to bid, until after he came to Ovid, and the direct assertion to the contrary in his answer, is sustained by the fact that he had no money with him, and did not know that he could borrow any, until the hour of the sale.

Allied with this, is the circumstance that Smith informed Mr. Sayre a few minutes before the sale, that Ludlum would bid off the property. This was also cited as evidence of an agreement to buy for Smith's benefit; but the impression of Sayre does not go so far as that, and if it did, it would be no evidence against Ludlum.

I will also advert, in connection with this, to the next point

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made, that there were only three persons present at the sale, besides the officer, viz : Smith, Ludlum, and Mr. Hanks, whom they requested to attend. This point is not proved. The answer states that there were at least four others present, and the witnesses mention the names of two.

It is alleged in the bill, that divers unknown persons were deterred from attending the sale by assurance from Smith or Ludlum or both, that the land was to be bid off by Ludlum for Smith. This charge embraces the circumstance that Smith so informed Sayre, and the whole charge is pointedly denied in the answer. The attempt to prove an opinion or impression of Mr. Sayre, failed ; and it could not overcome the force of the denial. The argument upon the absence of bidders, founded upon these circumstances, therefore has no basis, and falls to the ground. I agree with the complainant's counsel, that if Smith and Ludlum had prevented purchasers from going to the sale, or persons in attendance from bidding, it would have been a fraud on the complainant. But I can discover no proof that they attempted to do either. I cannot derive that proof from the absence of bidders. It is a frequent occurrence in judicial sales in the country, that no one attends except the creditor or his agent.

Another badge of fraud is made of the facts that no one bid at the sale, except Ludlum, and he bid at once the amount of the mortgage. The latter fact, which was so much dwelt upon, is readily explained. He probably knew that by the statute, the property could not be sold to any person, for less than that amount.

With the fact of his being the only bidder, I will take another which was pressed very hard, viz. Ludlum's borrowing the money of Barna Van Vleet, who was present at the sale, and who took no note for the loan. The bill charges no fraud or collusion on Van Vleet, so that his loaning \$150, to Ludlum, and trusting him several months without a note, are of no weight. But it is deemed extraordinary that Van Vleet, with the money in hand, did not bid. It is proved that he came there to bid on another parcel advertised by the commissioner, which had been redeemed before the sale. Whether he came for a speculation or otherwise, it does not appear. He did not intend to bid on Smith's land, and

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instead of bidding, he let Ludlum have the money for that purpose. Thus it seems he did not want the speculation, and that suffices. The money could not enable both to bid, and I do not see how the amount of the sale would have been enhanced, if Van Vleet had bid instead of Ludlum.

I now come to the inadequacy of price urged in connection with all the foregoing circumstances. But as each of those has proved to be unfounded or unimportant, the argument derives no additional force.

It was said there were peculiar relations between the complainant and these parties. This is a mistake. There was no relation between them, which inhibited either Smith or Ludlum from buying the farm for \$146, or even a less sum, if they could.

Most of the authorities cited on this subject, were cases of specific performance where a court of equity declined to interfere because of inequality in the contract, or where the court relieved because undue advantage had been taken of situations of confidence or duty. They have no application to public, statutory or judicial sales, made to bidders not affected by any duty, trust or fraud.

Two other circumstances remain to be noticed ; the admissions of Ludlum that he purchased for Smith's benefit ; and Smith's continuance on the farm. Whether he did or not so purchase, is of no consequence to the complainant, as a ground of relief. (*Sherrill v. Crosby*, 14 Johns. 358 ; *Botsford v. Burr*, 2 J. C. R. 405.) The fact, however, is pressed to raise the inference of combination between them, to enlist sympathy and stifle competition at the sale.

The fact is positively denied by the answer, and the testimony of McKnight is too indefinite to prove its existence.

As to the possession of the farm, in which Smith remained when the testimony was taken in August, 1843. From May 1, 1842, he was under a lease and liable to rent. If Ludlum had turned Smith out of possession the spring succeeding his purchase, the whole country would have cried out upon his cruelty. He had a perfect right to do it, and no tribunal on earth could have prevented it. But it is not to be used to deprive him of his rights, that he has not exercised them to their utmost extent. An entire

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stranger to Smith, buying for such a price, would doubtless have been equally lenient. As Ludlum is a neighbor of Smith, I may suspect or even believe, that he feels sympathy for him, and intends to restore the farm to him ; but neither the suspicion or the belief, will warrant me in charging him with fraud in its purchase under the circumstances proved in this suit. In the case of *Denning v. Smith*, (3 J. C. R. 332,) relied on by the complainants, the sale was irregular and void for non-compliance with the statute ; and Chancellor Kent deemed the evidence of abuse of trust on the part of the commissioners, so strong, as to be indicative of fraud. It resembled this case only in one point, the small amount of the bid in reference to the value of the property, and that point was not dwelt upon by the Chancellor. *King v. Stow*, (6 J. C. R. 323,) was more like this case. The land was sold for one-seventh of its value, and Mr. King who was its owner by purchase at a sheriff's sale, was ignorant of the existence of the loan office mortgage ; yet the sale was sustained by Chancellor Kent.

Upon the whole, I am unable to find any warrantable ground for interfering with this sale. The cause of the grievous loss which the complainant encounters, is not the defendants' fraud or inequitable conduct. It is rather his own neglect to ascertain the true situation of the property. Mortgages to the loan commissioners, were a species of lien of more than thirty years standing, and readily to be found in the county clerk's office. The law charged him with notice of the existence of this mortgage, and if he had no actual notice, it is not the fault of the statute which created the lien. It is a misfortune from which he cannot be relieved, without overturning established principles, and inflicting a greater public injury than can be made up by the remitted hardship of this case.

The bill must be dismissed, and the complainant must pay the costs of Mr. Sayre. I think under the circumstances, that the complainant ought not to be charged with the costs of the other defendants.

New York Life Insurance and Trust Company v. Manning.

THE NEW YORK LIFE INSURANCE AND TRUST COMPANY v.
MANNING and others.

A debtor on a mortgage bearing six per cent interest, who at the end of each half year for several years, pays seven per cent, taking receipts, each expressed to be for six month's interest ; cannot have the excess beyond six per cent, applied to extinguish the principal.

Each receipt so accepted by the debtor, is evidence of an agreement to pay seven per cent interest for the preceding six months ; and whether it be deemed antecedent or made at the time of payment, it has the same consideration, the creditor's forbearance ; and having been executed, the court will not interfere, even if the agreement were not such as could have been enforced.

Such receipts are not evidence of a continuing agreement to pay the higher rate of interest beyond the period which they cover.

September 10 ; October 2, 1845.

THIS was a suit to foreclose two mortgages on the same premises, executed by R. Manning to James Campbell, one for \$3000, and the other for \$500, with interest at six per cent, payable half yearly ; which were assigned by Campbell to the complainants, April 30th, 1836. The defendant Manning in his answer, claimed that he was entitled to be credited on the principal of the mortgages, with thirteen semi-annual payments of seventeen dollars and fifty cents each. He gave in evidence the complainants' receipts, thirteen in number, extending from 1836, to 1843, which were thus expressed. "Received of" &c. "\$122 50, being the amount of interest due on the 1st instant, on his bonds," &c.

The complainants proved that the payments expressed in these receipts, were made for interest on the mortgages, and no objection was made thereto by Mr. Manning.

W. Betts, for the complainants.

R. Manning, for the defendants, cited *Hollis v. Wise*, (2 Vern. 289 ;) *Shode v. Parker*, (2 *ibid.* 316 ;) *Thornhill v. Evans*, (2 Atk. 330 ;) *Walker v. Penrin*, (Prec. in Ch. 50 ;) *Van Ben-*

schooten v. Lawson, (6 J. C. R. 313 ;) *St. Andrew's Church v. Tompkins*, (7 *ibid.* 14.)

THE ASSISTANT VICE-CHANCELLOR.—The bill alleges that the whole principal sum secured by each of the mortgages, is due with interest from June 1, 1842.

The answer denies this, and sets up certain small semi-annual payments, which should be applied to reduce the principal. In support of the answer, the defendants produce thirteen receipts, each expressed to be for six months' interest, and each being equal in amount to the interest at 7 per cent. The sole question therefore is this :—Can a mortgagor whose mortgage secured 6 per cent interest, and who after the money became due, regularly paid interest at the rate of 7 per cent, afterwards claim to have the excess which he has paid beyond 6 per cent, applied to extinguish the principal ?

I am clear that he cannot. Each receipt taken and accepted by the mortgagor, is evidence of an agreement to pay interest at 7 per cent for the preceding six months. Whether it be regarded as proving an antecedent agreement to pay at that rate for the ensuing six months, or an agreement at the end of the time, it stands on the same valid consideration, forbearance to collect the debt. It being by parol, is not important, now that it is executed. This court will not compel a party to repay money received on an executed contract which was fair, equal and on a sufficient consideration, although the contract may have been one which the court could not, because of some defect or omission, decree to be carried into execution.

This is not the case of an agreement to compound interest which has not yet become due. The case of *Van Benschooten v. Lawson*, (6 J. C. R. 313,) cited by the defendants is inapplicable.

In *St. Andrew's Church v. Tompkins*, (7 *ibid.* 14,) the agreement, valid as to the mortgagor, was held to be inoperative against a second mortgagee, who had no notice of its existence.

In *Walter v. Penry*, (2 Vern. 145 ; Prec. in Ch. 50, and Eq. Ca. Ab. 288, pl. 1, S. C.,) there were conflicting decisions of different chancellors, upon the question whether a statute reducing

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the rate of interest from 8 to 6 per cent, affected the interest payable after its passage, on securities executed before. The judges who held that the mortgagee had no right to receive the old rate of interest, directed the excess which had been paid, to be applied in reduction of the principal. In their view, the collection of the excess was illegal. Here the payment of 7 per cent was lawful.

In the report of *Walter v. Penry*, in *Equity Cases Abridged*, it is said that the statute of Ann reducing interest to 5 per cent, did not operate upon debts previously contracted; and in *Precedents in Chancery*, the report states, that if both principal and interest had been paid, there should have been no refunding.

As the case does not affect the one before me, it is unnecessary to comment upon the decision. The same remark is applicable to the authorities, where a higher rate of interest was to be paid in default of a punctual payment. On the other hand, the principle of the cases of *Kellogg v. Hickok*, (1 Wend. 521,) and *Mowry v. Bishop*, (5 Paige, 98,) appears to be decisive against the defendant's claim to retract his payments, and have them applied to the principal.

The complainants are entitled to the usual decree. As there is no proof of a valid continuing agreement to pay a higher rate of interest, the computation from June 1, 1843, must be made at 6 per cent.

Decree accordingly.

DOBSON v. RACEY.

An agent, entrusted with the sale of real estate, cannot directly or indirectly, become the purchaser thereof, under the power conferred upon him.

D. owning a parcel of land which was mortgaged to R. for its value, executed a power of attorney to R. authorizing him to sell the land, and after retaining the amount due on the mortgage, to pay the surplus to D.'s wife. R. soon after, conveyed the land under the power, to H. without consideration, and H. immediately reconveyed it to R. The wife of D. joined in the deed to H., for which she re-

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ceived \$100, from R. On a bill filed by the heir of D., it was *held* that the sale could not be maintained, and that the heir was entitled to redeem the land from R.

September 5; October 3, 1845.

IN July, 1817, James Dobson, being seised of a tract of land on Staten Island, mortgaged it to Charles Racey, to secure the payment of \$1500, with interest. In October following, Dobson being about to leave the state, executed to Racey, with whom he was upon friendly terms, and who was a creditor exclusive of the mortgage debt, a power of attorney authorizing him to sell and convey the mortgaged premises in fee, in such manner as he might deem proper; and out of the proceeds of the sale after discharging the mortgage debt, to pay over the surplus to the wife of Dobson.

Dobson departed, and died abroad; at what time, is unknown. On the 19th of November, 1817, Racey by virtue of the power of attorney, conveyed the mortgaged premises to Thomas Harrison in fee. Mrs. Dobson, who had executed the mortgage in due form, united in the conveyance to Harrison, releasing her right of dower in the equity of redemption; and thereupon Racey paid to her \$100. The value of the premises was about equal to the amount of the mortgage. No consideration was paid or agreed to be paid by Harrison, and two days after receiving the deed, he conveyed the premises to Racey in fee. Racey entered into the possession, and continued therein until his death, when the defendant his widow and administratrix took the possession, and has retained it ever since. No proceedings were ever had to foreclose the mortgage executed by Dobson.

The complainant is the only child and heir of Dobson, and was born soon after he departed from the state. On the 31st of January, 1844, she filed the bill in this cause, claiming that the sale to Harrison was inoperative and void, and that she was entitled to redeem the mortgaged premises; and she prayed an account of the rents and profits, and a redemption accordingly. The answer stated that the sale and conveyance to Harrison were made to pay Dobson's debt to Racey, and to vest the title of the mortgaged premises in the latter, without the expense of a

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foreclosure ; and it insisted on the perfect good faith of the transaction.

S. A. Crapo, and *T. W. Tucker*, for the complainant.

E. Ward, and *W. W. Campbell*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The validity of purchases made by fiduciaries, of the property entrusted to them, has been much considered recently in the courts of equity, both in this state and in England. And it is now a settled rule both there and here, that no party can be permitted to purchase an interest, where he has a duty to perform which is inconsistent with the character of purchaser. (*Greenlaw v. King*, 5 Lond. Jur. Rep. 18, before Lord Cottenham ; *De Caters v. Le Ray De Chaumont*, 3 Paige, 178 ; *Van Eps v. Van Eps*, 9 *ibid.* 237 ; *Torrey v. Bank of Orleans*, 9 *ibid.* 649 ; *Hawley v. Cramer*, 4 Cowen, 717 ; *Rogers v. Rogers*, Hopk. R. 515 ; *Hamilton v. Wright*, 9 Clark & Fin. 111 ; *Cram v. Mitchell*, 3 N. Y. Legal Obs. 163 ; and *Dickinson v. Codwise*, Jan. 24, 1844, before the Assistant Vice-Chancellor.)(a)

In this instance, whether Charles Racey is to be regarded as a trustee, or as an agent, the rule was applicable to him. His interest as a purchaser was in direct conflict with the interest of Dobson, his constituent or *cestui que trust*. His purchase caused one of those collisions between interest and duty, which equity has wisely and resolutely prohibited.

It is said that there was no fraud committed or advantage taken by Racey. This makes no difference in the application of the principle. The very position of the agent or trustee, however, gives him an undue advantage as a buyer ; and when he avails

(a) These cases are reported in 1 Sand. Ch. R. 214, 251. And see *Charter v. Trevelyan*, (11 Clark & Fin. 714, S. C. 4 Law Journal, N. S. Chancery, 209,) before the Master of the Rolls ; where after thirty-seven years, a purchase by an agent of the lands which he was authorized to sell, was set aside as fraudulent ; the facts having remained unknown to the principal, and the sale having been made at a great under-value in price.

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himself of such an advantage, he is guilty of a constructive fraud.

The transaction in question is certainly not free from suspicion of wrong. The conveyance to Harrison was executed within six weeks after the power was conferred upon Racey, and after the constituent had left the country. If such a speedy execution of the power had been in contemplation, the parties would naturally have sold the property and completed the sale before Dobson's departure. But I need not dwell upon this aspect of the case.

Again, it is urged that no injury ensued to Dobson or any one else. This also, if true does not alter the case. The law declares the sale unwarrantable on grounds of public policy, irrespective of any proof of injury or intentional wrong. In *Greenlaw v. King*, both the Master of the Rolls and the Chancellor fully exonerated the party from every charge of bad faith or wrongful intention; yet they rigidly enforced the principle which I have stated.

Nor is it an admissible ground for making an exception to the rule, that the trustee paid the fair value of the property. If a trustee desire to become the purchaser in good faith, his simple course is to resign his trust, and appear as a bidder or purchaser.

It may be true, as was urged, that a foreclosure of Racey's mortgage, or a sale to a *bona fide* purchaser, would have left no surplus for Dobson. Either of those modes was open for Racey to pursue, but he adopted neither; so that it is useless to speculate on what might have ensued from them.

Another ground of defence is, that Mrs. Dobson joined in the sale, and received \$100, from Racey. This sum being paid to her as the consideration, may be regarded as given for her inchoate right of dower. Whether it was paid to her for that cause, or as a surplus, it cannot confirm a sale which was irregular as against Dobson. She was not clothed with any authority in respect of his estate in the land, and her assent to the conveyance to Harrison is of no avail against Dobson. He conferred on her one-half of the surplus, but she had nothing to do with its creation, under the instrument which he executed to Racey.

The complainant as the heir of Dobson is entitled to redeem

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the lands in question. There is however a defect of parties which precludes the entry of a decree to that effect in this stage of the cause. The heirs or devisees of Racey, are necessary parties to the suit, and it must stand over in order that they may be brought before the court. If Mrs. Racey succeeded to all the title of her husband, the bill may be amended. Otherwise there will have to be a supplemental bill.

Decree accordingly.

 CONKLIN and wife v. CONKLIN and others.

Lands were devised to the testator's nephew for life, and at his decease to his male heirs which he "*now has or may have hereafter*;" but in case he should die without male heirs, then the lands were devised to his female heirs. At the date of the will and the death of the testator, the nephew had four sons living, two of whom outlived him, and two died in his lifetime. M. one of the latter, left a widow, two sons and a daughter; E. the other son, died intestate, and without issue. The nephew had two sons born after the testator's death, one of whom, L. died before his father, intestate and without issue. The other was the complainant in the suit. The nephew had two daughters, of whom one survived him, and the other F. died in his lifetime, leaving several children. On the construction of the will, it was *held*;

1. That by heirs male of the nephew, the testator meant *heirs apparent*; and that the devise embraced sons born after the death of the testator, as well as those then living.
2. That the sons living at the death of the testator, took vested remainders in fee in the lands, subject to open and let in after born sons; and that the latter took like vested interests, on their births respectively.
3. That the limitation to the female heirs was void, being consequent on an indefinite failure of male heirs.
4. That on M.'s death, his share descended to all his children, male and female.
5. That the testator's nephew, on the deaths of his sons E. and L., inherited their shares; and on his death the same descended, as in an ordinary intestacy, to his children and grandchildren.

Three of the sons having expended a large sum in valuable improvements, on the premises, in good faith, supposing that they were the sole owners; they were allowed in partition for such amount as the present value of the premises was enhanced by such improvements.

September 10; October 3, 1845.

Conklin v. Conklin.

THIS was a suit for the partition of lands in the county of Suffolk, of which Epenetus Conklin died seised on the 23d of April, 1801. By his will dated four days before his death, he made the following disposition.

"Item. I give and bequeath to my nephews Epenetus Conklin and Elkanah Conklin, to them, their heirs and assigns, the residue and remainder of all my personal estate," &c. "My will further is that my nephews Epenetus and Elkanah, shall have the use to occupy and improve the residue and remainder of all my real or landed estate, my houses and improvements and privileges whatsoever, excepting what has been heretofore disposed of, during their natural lives; and at their decease I bequeath and devise it to their male heirs that they now have or may have hereafter, but in case they die without male heirs, then I bequeath and devise it to their female heirs. My will further is that my lands or meadows lying in the town of Islip that I have given to my brother Platt Conklin during his natural life, and at his decease I give and bequeath to my nephews Epenetus Conklin and Elkanah Conklin, to use, occupy and improve with all the privileges thereunto belonging during their natural lives, and at their decease I bequeath and devise it to their male heirs that they now have or may have hereafter. And in case they die without male heirs, then I bequeath and devise it to their female heirs. It is my will, I do devise, order and direct that my executors shall make a just division as near as they can ascertain according to their knowledge and judgment, of all my real or landed estate, improvements and privileges of every kind that I have given to my nephews Epenetus Conklin and Elkanah Conklin during their natural lives. After such division is so made, Epenetus and Elkanah shall or may set the separate divisions at auction between themselves only, and bid for choice if they do not otherwise agree upon a division. Notwithstanding what is above written, such divisions so made by my executors of all my real or landed estate, houses and improvements of every kind what I have given to my nephews Epenetus and Elkanah, shall be utterly binding to them, and each of them, and to their separate heirs forever in fee simple."

In 1806, a partition and division was made between the

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nephews Epenetus and Elkanah, of the premises so devised to them; by which division the lands in question in this suit became vested in Elkanah Conklin, in severalty according to the will. At the date of the will and at the death of the testator, Elkanah C. had four sons living, viz. Ebenezer, Moses, Elkanah H. and David S., who were his only presumptive male heirs. During the life of Elkanah C., (the testator's nephew,) his son Ebenezer died intestate and without issue; and his son Moses also died, leaving his widow, Sarah R., and three children, Moses, Sarah A., and George, all of whom are still living.

Elkanah C. had two other sons born after the testator's death, viz. Isaac and Joseph O., of whom Isaac died in his father's lifetime, intestate and without issue. Freelope, a daughter of Elkanah C., died in his lifetime, leaving issue by two husbands, viz. William, Moses, Joseph H., John and George O'Kell, and Gertrude Doughty. Her last husband, William Doughty, survived her. Mary another daughter of Elkanah C., married John Harris. Elkanah Conklin died July 28th, 1842. He left no issue other than those enumerated.

The bill was filed by Joseph O. Conklin and his wife, against the surviving children, and grandchildren of Elkanah Conklin, his widow, the widow of Moses C., William Doughty, and two mortgagees of undivided shares in the premises. One of the mortgages it was charged, was given for moneys expended in improvements on the premises, made at a time when the three surviving sons supposed they owned the whole in fee under the will. The bill charged that the children of Freelope Doughty had no estate or interest in the premises; and it claimed an allowance for the sums laid out in improvements, to the extent of the value of the same.

S. W. Gaines, for the complainants.

J. McKeen and *S. D. Craig*, for the children of Moses Conklin.

J. T. Brady, for the infant children of O'Kell.

THE ASSISTANT VICE-CHANCELLOR.—The devise to the

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nephews of the testator was clearly for their life only, and the words used in the devise of the remainder, are not such as would have created an estate tail, within the rule in Shelley's case. (6 Cruise's Digest, 346; *Tanner v. Livingston*, 12 Wend. 83.)

The principal question in the cause, arises upon the construction of the words, "*their male heirs that they now have or may have hereafter*," in the gift of the estate in remainder.

It is insisted in behalf of the various parties, 1. that the testator intended only those who were properly *heirs* of his nephews, which construction excludes those male children of Elkanah Conklin who died in his lifetime. 2. That the devise was to all such heirs proper *per capita*, and not *per stirpes*. And 3., that all Elkanah's male children living at the death of the testator, took a vested remainder in fee, which remainder opened and let in after born male children of Elkanah.

The expression "*male heirs that they now have*," is a good description of the male children of the testator's nephews who were then living. The testator meant *heirs apparent*, and not heirs in its legal signification. (1 Powell on Devises, by Jarman, 306; 1 Fearn on Cont. Rem. 320; *James v. Richardson*, T. Jones, Rep. 99, S. C. T. Raym. 330, and Carthew, 154, *nomine*, *Burchett v. Durdant*.)

The devise of the remainder therefore, embraced all the sons of Elkanah Conklin who were living at the death of the testator, as well as those who were born subsequently.

The next inquiry is whether those sons took vested interests, during the continuance of their father's life estate; or were the devises to them contingent remainders?

There is nothing in the will adverse to the ground that these remainders vested, except the limitation over on Elkanah's dying without male heirs. I need not stop to consider the force of that limitation, in this part of the case, for I do not think that if valid, it prevents the remainders from vesting in his sons. After the death of the testator each of the sons of Elkanah then living, would on the death of their father have had an absolute and immediate right to the possession of the lands in question. It was a right, which could not be defeated by any contingent event, failure of condition precedent, or act of a third person; provided

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they lived till the end of the particular estate, and the termination of that estate was an event which was certain to happen. The remainders therefore, vested in interest at the death of the testator, in the sons of Elkanah then living, subject to open and let in his after born sons, and the latter on their birth respectively, took like vested remainders as tenants in common with their brothers. (See *Hawley v. James*, 5 Paige, 466, per Chancellor; *Macomb v. Miller*, 9 *ibid.* 265; S. C. on appeal, 26 Wend. 229; *Williamson v. Field*, July 21, 1845, before the Assistant Vice-Chancellor.)^(a)

If the limitation to the female heirs, on the failure of heirs male, were valid, then these remainders which vested in the sons, were liable to be defeated by that event. But I am satisfied that the limitation was too remote, and it can not be upheld. It was to take effect on Elkanah's dying *without male heirs*; in other words, upon an indefinite failure of his male heirs, lineal and collateral; which might happen by possibility in this generation, but which more probably, would never happen. It was therefore void, according to the established rule which prevailed before our revised statutes. (4 Kent's Comm. 273, *et succ.*, 2d ed.; *Macomb v. Miller*, *ubi supra*.)

The result is that each son of Elkanah Conklin living at the testator's death, or born subsequently, took a vested and absolute estate in fee in remainder, in the premises devised. On the death of Ebenezer and Isaac without issue, Elkanah their father inherited their undivided shares, and on his death, those shares descended to his heirs.

The children of Moses Conklin inherited his share, and also their proportion of the shares of Ebenezer and Isaac. And the children of Mrs. Doughty as heirs of their grandfather, inherited a part of the same two shares.

Mrs. Harris in like manner inherited one-sixth part of the same shares of the property.

The partition must be made on these principles.

In regard to the improvements, the three sons who survived

(a) Now reported, 2 Sand. Ch. R. 533.

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Elkanah, assert that they were made in good faith, and under the supposition that the whole title vested in those sons under the will of the testator. So far as the expenditures thus made, enhance the present value of the premises, the case of *St. Felix v. Rankin*, (3 Edw. Ch. R. 323,) is an authority for allowing such value to those parties.(a)

The complainant's counsel omitted to introduce proof on the point, supposing it would be proper on the reference as to title.

As there must be a reference also to establish the truth of the bill as against the infant defendants, the order may embrace the subject of the alleged permanent improvements. On the coming in of the master's report, the cause may be set down for a hearing, and a decree for partition made in conformity with the facts as they then appear, and with the views now expressed.

LOFSKY v. MAUJER and others.

A mortgagee, whose debt is all due and is defectively secured, by procuring a receiver, obtains an equitable lien on the unpaid rents of the lands mortgaged.

Previous to the appointment of a receiver in a foreclosure suit, the owner of the equity of redemption by purchase from the mortgagor, had received from his tenant, a note for the rent accrued and a mortgage on personal property executed by a friend of the tenant for its further security; but no actual payment had been made. *Held*, that there was no merger of the rent, but the landlord's right to distrain continued; and that the receiver was entitled to the unpaid rent in preference to the owner of the equity of redemption.

September 9; October 4, 1845.

THIS was a suit to foreclose a mortgage for \$2435, executed by Lewis Katen to the complainant, on lands in Newtown, Queen's County, dated September 23, 1841. There was a prior mortgage of \$700; the premises were worth considerably less than the amount of the two liens; and the mortgagor was insol-

(a) And see *Neesom v. Clarkson*, before Sir James Wigram, V. C. 4 Hare's R. 97.

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vent. In October, 1842, Katen conveyed the premises, subject to the mortgage, to Daniel Maujer who took possession and continued it until the foreclosure. On filing the bill, April 13th, 1844, the complainant obtained an injunction restraining Maujer from collecting the rents or any securities received therefor; and in due course a receiver was appointed. After the cause was at issue, a decree of foreclosure and sale was taken by consent, reserving the question as to the rents and securities.

The facts bearing upon that point were as follows. On the first of April, 1843, Maujer hired the mortgaged premises to Joseph S. Hixon for one year, at the rent of \$150, payable quarterly. On the 2d of December, 1843, Maujer obtained for the year's rent, the joint promissory note of Hixon and his sister, payable at four months from December 1st, and a mortgage of the sister on her goods and chattels as further security. For the note and mortgage, Maujer gave Hixon a receipt, expressing that the note when paid, was to be in full of the year's rent, and was also to be in discharge of the mortgage on the chattels. The note was not paid when due, and Maujer through an officer, had seized the goods mortgaged; when the injunction suspended his proceedings.

The cause was heard for further directions on the single point, whether Maujer or the complainant, was entitled to the sum secured by the note and the mortgage on the chattels of Hixon.

P. W. Turney and M. Hoffman, for the complainant.

C. Paget and J. N. Platt, for the defendant Maujer.

THE ASSISTANT VICE-CHANCELLOR. There was no payment of the rent in question to Maujer, nor was it merged or extinguished by his taking the note, and the mortgage on the goods of Julia C. Hixon.

The idea of a payment, is fully negatived by the receipt which he gave, as well as by the statement in the answer, which omits to allege that the securities were accepted in satisfaction of the rent.

Instead of there being a merger, the note was a debt of a lesser

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grade than the rent, and the mortgage was no debt at all. It went to secure the debt represented by the note.

In short, there is no doubt but that Maujer when this bill was filed had a right of distress for the rent in arrear.

It remains to be seen whether the complainant by his bill and the appointment of a receiver, became entitled to the rent which Maujer had secured, but had not collected.

The mortgage debt was all due, and the lands mortgaged were wholly inadequate to satisfy the amount. It appears also that the mortgagor was greatly embarrassed in his circumstances, if not insolvent; but this is perhaps, immaterial, Maujer having taken his conveyance from the mortgagor, subject to the mortgage.

It is well settled that in a case like this, the court of chancery will appoint a receiver of the lands mortgaged, and will restrain the mortgagor or his grantee from collecting the accrued rents, unpaid by the tenant, as well as the future rents. This is clearly the effect of what the Chancellor held in the case of *Howell v. Ripley*, (10 Paige, 43.)

The whole object of this proceeding, is to divert the unpaid rents from the mortgagor to the mortgagee.

The cases cited by the complainant's counsel, show that as between the mortgagor and the mortgagee, the latter has a *legal* right to the rent in arrear, after the mortgage becomes due. Where the lands were demised before the mortgage was given, the cases establish that the mortgagee might distrain for such rent; and they also prove that upon the tenant's attorning, he would have the same remedy upon a lease made by the mortgagor after the execution of the mortgage.

Here the lease was subsequent, and the tenant had not attorned. Previous to the revised statutes, there was a legal remedy in such a case, by the action of ejectment. That remedy is now taken away, but the right remains, and courts of equity enforce it by injunction and receiver.

In *Howell v. Ripley*, the Chancellor decided that the junior mortgagee who had resorted to this court in that mode, was entitled to the unpaid rents accrued, and that he should hold them against the prior mortgagee, until the latter availed himself of

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the same remedy. And he considered that the collection of the rents by the receiver in behalf of the junior mortgagee, was equivalent to a collection of the same by such mortgagee in possession.

In the same case, he observed that the prior mortgagee, on obtaining a receiver, would intercept any rents accrued which the receiver first appointed had not actually collected.

The result of the law on the subject is, that a mortgagee whose debt is all due and is defectively secured; by filing his bill to foreclose his mortgage and procuring a receiver, obtains an equitable lien on the unpaid rents of the lands mortgaged.

In this case the rent was still due by virtue of the lease, it of right belonged to the mortgagee, and his bill having intercepted it, the amount collected pending the suit, must be paid to the complainant.

As to the point that the property from which the rent was collected, did not belong to the tenant; there are two answers to it. It was property upon the land demised, and for aught that appears, was subject to be distrained for the rent. And the mortgagee being entitled to the principal debt, the rent; was entitled to all the securities appurtenant to it.

Decree accordingly.

ALLERTON v. JOHNSON.(a)

A conveyance of land, or contract for its sale, is to be construed by its distinct and visible boundaries and monuments as marked or appearing on the land, in preference to quantity, map, or a reference to a previous deed.

Thus, where an agreement for the sale of land and its conveyance at a future day, described it as forty acres on the east end of lot four, being all the land deeded to

(a) This and two cases subsequently reported, were heard at a special term held at the court house in the village of Ithaca, on the 4th Monday of September, 1845; for the Sixth Judicial Circuit; the office of Circuit Judge and Vice-Chancellor in that circuit being vacant.

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the vendor by P. S., and bounded by a river on the east, by P.'s land on the west, by the old P. farm on the north, and by the vendee's land on the south; and it turned out that there were fifty-four acres within the boundaries last mentioned; it was *held*, that the vendee was entitled to all the land within those bounds, although the deed from P. S. contained only forty acres.

It is no objection to enforcing the performance of a contract for the sale of the lands, in behalf of the vendee, that the vendor did not own the lands when the contract was made. If he can make a good title to all at the time of the decree, the court will direct him to convey the whole; if he can make title to a part only, the vendee may take such part with a compensation for the residue.

Ithaca, September 22; October 10, 1845.

THE bill was filed for the specific performance of an agreement, by which the defendant covenanted to sell and convey or procure to be conveyed, to the complainant, a tract of land in Triangle, Broome county, on receiving four hundred dollars, at a day stipulated. The contract described the land as being "forty acres on the east end of lot number four, being all the land deeded to the party of the first part," (the vendor,) "by Peter Smith;" after which followed the further description, that the land was bounded by the Otselic river on the east, Lewis Page's land on the west, the vendee's land on the south and the old Page farm on the north. The complainant paid the price as stipulated, and the defendant tendered to him a proper conveyance of forty acres of land lying in the east part of lot four. It was also claimed to be the forty acres conveyed to the vendor by Peter Smith. The complainant refused to receive the deed, because it did not contain the land bounded as lastly set forth in the contract.

The difficulty between the parties, arose from the fact that those bounds were found to include fifty-four acres of land. When the contract was made, the defendant had title to only forty acres, being the land conveyed by P. Smith. The residue of the fifty four acres was owned by Smith, and the defendant had been negotiating for it. He subsequently bought it and obtained a deed. It did not appear that forty acres laid off on the east end of lot number four, extending an equal distance on both sides of the lot, would contain the same land that Peter Smith conveyed to the defendant.

The complainant insisting on having a deed which would carry him to Lewis Page's land on the west, the old Page farm

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on the north, and his own land on the south, which the defendant refused to execute, filed the bill in this cause on the 14th of July, 1842.

The defendant put in an answer, testimony was taken on both sides, and the cause was brought to a hearing on the pleadings and proofs.

D. S. Dickinson, for the complainant.

E. Foote, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The contract gives three particulars, either of which, if it stood alone, would have sufficiently described a known parcel of land. The first is forty acres of land on the east end of lot number four. The second is a continuation of that, and was expressed as “being all the land deeded to the party of the first part by Peter Smith.” The third, designates a piece of land by surrounding boundaries. It does not appear whether the first description standing by itself, would have included the land obtained by the second or the third particular; because the evidence does not show distinctly that lot number four was bounded north by the old Page farm, or south by lands previously owned by Allerton. A deed conveying forty acres on the east end of lot four calls for all the land on the east end, from the south to the north side. Besides, the designation of quantity, does not control, where there are courses and distances, or monuments, describing the land intended to be conveyed. (*Jackson, ex dem. Livingston, v. Barringer*, 15 John. 471; *Jackson, d. Overacker, v. Cole*, 16 *ibid.* 257; *Hathaway v. Power*, 6 Hill, 453.)

The first description, except in connection with the others, must be laid out of view.

Next is the identification by reference to Smith's deed. This was sufficiently definite, because it could be made certain by the description in that deed. And the third mode which the contract furnishes for locating the land, is equally definite and certain, without any extrinsic paper evidence.

But it turns out that the land included in this description

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extends farther west than the parcel conveyed by Peter Smith's deed.

What then was the intention of *both parties*, as derived from the contract? The only description given, by which Allerton, taking the contract for his guide, with no surveyor and no other paper to aid him, could find and locate the land, is the one which I have noted as the third. By that one, he would find the land for which he contracted, lying between the Otselic river on the east and Lewis Page's land on the west, and between his own land on the south, and the old Page farm on the north. Here were distinct, plain and visible designations of his boundaries. With the aid of a surveyor and by running out the land, he would have ascertained that there were over fifty acres within those bounds. And with a surveyor and Smith's deed, he would have learned that the northwest or west portion of the land, had not been conveyed to Johnson.

But having in view that the parties were near the property when they were contracting, and one of them owning adjoining land; that Smith's deed was not present or exhibited to Allerton; and that they included in their contract the land contained within such notorious and well defined limits as those under consideration; I cannot doubt but that both of the parties intended to contract with reference to those limits.

If I thought otherwise, the case of *Van Wyck v. Wright & Johnson*, (18 Wend. 157,) in the court for the correction of errors, is a decisive authority in support of giving that construction to the contract. It is there settled that a conveyance is to be construed in reference to its distinct and visible locative calls as marked or appearing on the land, in preference to quantity, course, distance, map, or any thing else. In that case the map was quite as definite as Peter Smith's deed was in the case before me. There also, besides the calls which were marked on the land, a reference was made to the deed under which the grantor held; yet the Chancellor says in his opinion, that if the deed thus referred to, had contained a direct reference to the map on file, it would not have altered its legal construction.

The case of *Jackson, ex dem. McNaughton, v. Loomis*, (18 Johns. 81, S. C. in error, 19 *ibid.* 449;) contains a stronger

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application of this principle than I am giving to the contract in question.

And *Jackson, d. Swain, v. Ransom*, (18 *ibid.* 107,) as well as the cases before cited, shows that there is such repugnancy between the descriptions in this contract, as calls for the application of the principle of construction by which the first is to be received and the last rejected.

If resort were to be had to the extrinsic evidence of the intention of the parties, it certainly confirms the legal conclusion derived from the contract itself.

From Mr. Ransom's testimony it is fairly inferrible, either that Johnson when he contracted with Allerton, supposed P. Smith's deed conveyed all the land east of Lewis Page's possession, or that having learned there was a parcel of land adjoining Page's, which was not embraced in his deed, he had by himself or Ransom, agreed with Smith for its purchase. On either hypothesis, it is plain that he intended to sell by the boundaries described. The language of the contract, that he would give, *or procure*, a good warrantee deed, indicates that the latter supposition is the true one. If he were aware that his deed did not convey all the land as far west as Lewis Page's, and really intended to sell no more than his deed included, his insertion of those boundaries evinced an intent to defraud Allerton.

I am confident that he entertained no such design, and that as both parties understood the contract when it was made, the one sold and the other bought, all the land lying between Lewis Page's possession and the river.

It is no objection to the validity of the contract, that the defendant did not own the lands contracted, when he stipulated for their sale. It suffices for a specific performance, that he now owns the whole. If he could not make a good title to the whole, the complainant could insist upon a title to such as he now has, and a compensation in damages for the residue.

There must be a decree for a specific performance accordingly, and the defendant must pay the costs of the suit.

SMITH'S EXECUTORS v. WYCKOFF and others.

A bank holding a promissory note made by L. and indorsed by P. for his accommodation, when the note fell due, to enable L. to pay it, discounted for him his own note; to secure which L. delivered to the bank, another promissory note made by himself and indorsed by P., dated about a year prior to that time, and payable two years after date. [When this delivery took place, P. was dead, and the officers of the bank were aware of the fact.] The original note was not protested, and was cancelled under this arrangement. *Held*, that neither P. or his executors, were ever liable upon the note thus negotiated after his death; and that it was not a charge upon real estate, which P. after its date devised subject to the payment of all notes which he had endorsed for L.

A note indorsed for the accommodation of the maker, has no vitality, or existence as a contract, while it remains in his possession.

An indorsement on a blank sheet, intended for a note, authorizes the person to whom it is delivered, to write upon the sheet such note as he thinks proper.

All accommodation indorsements delivered to the principal debtors, clothe the latter with an *authority* to bind the indorsers in favor of persons who receive the securities in good faith on the credit of the indorsements.

Such authority is a mere naked *power*, revocable by the constituent.

All such powers are annulled by the death of the constituent. "The death of an accommodation indorser of a promissory note, before it is negotiated by the maker, annuls the latter's authority to issue the note as one binding upon the indorser."

A testator devised a farm to his son, subject to an annuity to the wife of the testator; subject to the payment of two debts by name, which he had incurred, for his son; also to all other debts which he had signed with or indorsed for his son; subject further, to the payment of debts which his son owed to N. and O., children of the testator; and also subject to the payment of all debts which the son owed to the testator: On a bill to sell the farm to satisfy the charges upon it;

Held, 1. That the annuity to the widow was entitled to preference over all the others.

2. That the debts which the testator had incurred for his son were next to be paid.

3. That the son's debts to N. and O., and to the testator, were next to be paid without preference; and that there should be no distinction, in favor of or against sureties, between debts of the son to the testator on which were sureties, and those wholly unsecured.

A charge in the will was, to pay "my bond for \$1500, given to H. O. for money loaned for my son's use." There was no such bond, but the testator had delivered to H. O. a bond payable to M. S. for \$1500, for the purpose described; H. O. having made the loan for M. S. and received the interest as agent. *Held*, that the bond to M. S. was intended and was a valid charge under the devise; and that the evidence was competent to show the misdescription.

May 7th; October 16th, 1845.

Smith's Executors v. Wyckoff.

The bill in this cause was filed by Edward H. Smith and Nathaniel Smith, executors of Edmund Smith deceased, on the 22d day of June, 1843, and was amended July 29, 1844. The amended bill set forth that Peter Wyckoff late of Bushwick in Kings county, in his lifetime, together with his son Lambert, made their joint and several promissory note, dated November 11th, 1837, and payable three years thereafter, to the order of Edmund Smith, for five thousand dollars, with interest half yearly. That the payee died in May, 1842, and that the note with interest from May 14, 1842, was wholly unpaid and was held by the complainants as his executors.

The bill further stated that Peter Wyckoff died in 1842, leaving a will dated April 8th, 1842, duly executed, and which is set forth at large in the bill. The only part of the will which was material in this suit, is in the following words, viz.

"Item. I give and devise to my son Lambert and to his heirs and assigns, the farm which I own in Bushwick near a place called the Wood Point, subject nevertheless to the payment of two hundred dollars per year in half yearly payments to my widow, during her widowhood, in lieu of her right of dower in said farm. Also subject to the payment of a note which I have signed for his use, in favor of Edmund Smith of the city of New York, for five thousand dollars. Also subject to the payment of my bond for fifteen hundred dollars, given to Henry Onderdonk, for money loaned for his use. Also subject to the payment of every other note or obligation for the payment of money, which I have signed with him or endorsed for him, for the payment of which I or my executors or administrators am or may be liable. Also subject to the payment of the debts which he owes to my son Nicholas, and my daughter Anne the widow of Adrian Onderdonk. And also subject to the payment of all the debts which he owes to me on his notes and obligations. Item. I give and bequeath to my daughter Anne the widow of Adrian Onderdonk, and Sarah the wife of John G. Van Cott, all my personal estate which is not already disposed of in this will, to be equally divided between them or their heirs, by my executors within two and a half years after my death, from which time and not before, my executors will charge interest for my said daughters, upon the debts which my

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son Lambert owes to me. Item. I nominate and appoint as executors to this my will and testament, my son Nicholas and my friends Barnet and Jerom's Johnson, requesting them to settle my estate within two and a half years after my death."

The bill charged that the four children named in the will, were the only heirs of the testator; that his wife survived him; and that letters testamentary were granted to all the executors. That the farm devised to Lambert, contains about one hundred acres, was in his possession when the testator died, and had ever since been in his possession.

That the bond to Henry Onderdonk mentioned in the will, is due and unpaid. That the testator in his lifetime, indorsed for Lambert's accommodation, his note for \$1600, which was duly protested when due, and is held by the Long Island Bank. That the testator in like manner indorsed for Lambert's accommodation his note for \$1200, which was protested at its maturity, and is owned by Stephen Burkhalter. That the Merchants Exchange Bank of the city of New York, hold a note of Lambert's, dated December 13th, 1841, for six thousand dollars, payable two years after date and indorsed by the testator, which was protested at its maturity. That notice of the non-payment of all the foregoing notes was given in due form to charge the indorser. That as the complainants believe, there are no other creditors of the testator, whose debts were charged upon the farm devised to Lambert. That the creditors enumerated, have a lien upon the farm, prior to all others, except the widow's annuity. And that John Wyckoff has a judgment for \$6000, against Lambert, regularly docketed; but which is subsequent and subordinate to all the charges imposed upon the farm by the will of Peter Wyckoff. The bill prayed that an account might be taken of the complainant's debt and of the other enumerated preferred debts, and of all other debts of the testator which were charged upon the farm; and that the farm or so much as should be necessary, might be sold or mortgaged, for the satisfaction of the debts which should appear upon such account to be due and owing; and for further or other relief.

The defendants named in the bill, were the executors, of Peter

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Wyckoff, Lambert Wyckoff and wife, and all the creditors of Peter or Lambert heretofore mentioned.

The answer of the executors, set forth that the charge on the farm devised to Lambert, of a bond to Henry Onderdonk, was meant and intended by the testator to be a charge of a bond given to Margaret Schenck, for the same amount and for the same purpose as is described in the will. That the testator had given no bond to H. Onderdonk, but the latter loaned the money for which the bond to Schenck was given, and acted as her agent in relation to investing it, and in receiving the payment of interest. The answer further stated that the executors had paid the Schenck bond out of the personal estate of the testator, and claimed that they were entitled to stand in the obligee's place, and to enforce the charge of the bond against the farm devised to Lambert.

The executors, as also Nicholas Wyckoff and Aune Onderdonk, insisted that the note held by the Merchants Exchange Bank was not a valid charge on the farm, because at the time of the testator's death, it was in the hands of Lambert, the maker, not negotiated; and the indorsement being without consideration, the note as against the testator, never had vitality or legal inception. Also that the Merchants Exchange Bank knew of the testator's death, when they received the note.

N. Wyckoff and Mrs. Onderdonk set up their debts charged upon the farm by the will, and claimed priority with the complainants over all others; and the executors also claimed for the debts due from Lambert to the testator, and that of such debts, those should be first paid for which the testator had no other security.

The Merchant's Exchange Bank put in an answer setting up their note referred to in the bill. The answer stated that on the 17th day of December, 1842, the bank held and owned a note for \$5778 56, made by Lambert Wyckoff and indorsed by the testator, which matured on that day, and which the bank had discounted in the testator's lifetime. That on the same day, the bank, to enable Lambert to take up the note so matured, discounted his new note for the same amount, in the usual course of business, and received as collateral security for such new note, the note of \$6000, described in the bill, made by Lambert, in-

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dorsed by Peter, dated December 13th, 1841, and payable ten years after date. And that the proceeds of the discounted note were applied in payment of the note which fell due on the 17th of December. That nothing has ever been paid on Lambert's new note to the bank. That the note received as collateral security, was regularly protested for non payment on the 16th of December, 1843, and notice thereof given to Peter Wyckoff's executors. That one of the executors afterwards called at the bank, and after examining the note, in effect admitted its validity, and promised that it should be paid. The bank insisted that the note was a valid preferred charge against the farm in question.

John Wyckoff answered the bill, setting up his judgment against Lambert, and insisting that if the farm were sold to pay the testator's debts charged upon it, he ought to be substituted in place of the creditors so paid, against the personal estate of the testator.

The Long Island Bank and Stephen Burkhalter, respectively answered, setting up their claims as stated in the bill.

Lambert Wyckoff also put in an answer,⁶ presenting various points, but as he did not appear at the hearing, it is unnecessary to set them forth.

Testimony was taken in the suit, principally in reference to the descriptive error in the will, relative to the bond debt to Henry Onderdonk, and respecting the note held by the Merchant's Exchange Bank. The conclusion of the court on both points, appears in the opinion, and it is deemed needless to insert the testimony on which it was founded.

It appeared that Peter Wyckoff died on the 20th day of September, 1842, aged about seventy-four years. The material facts relative to the various debts set forth in the pleadings, were established by the evidence.

Henry Nicoll, for the complainants, and also for P. Wyckoff's executors, N. Wyckoff and Mrs. Onderdonk.

J. M. Martin, for the Merchant's Exchange Bank.

J. L. Riker, for John Wyckoff.

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B. D. Silliman, for the Long Island Bank.

R. H. Waller, for S. Burkhalter.

Mr. Nicoll, in behalf of N. Wyckoff, Mrs. Onderdonk, and Peter Wyckoff's executors, made the following points.

I. The charge upon the premises devised to Lambert Wyckoff, of a bond for \$1500 given to Henry Onderdonk, was meant and intended to be a charge of a bond given for the same amount and for the same purpose, by the testator to one Margaret Schenck. And as such will be sustained and recognized as binding upon the premises. (Powell on Devises, Vol. 2, p. 337, and cases cited; 6 Vesey, 42; *Doe v. Roe*, 1 Wend. 541, and cases cited; *Connolly v. Pardow*, 1 Paige, 291; *Thomas v. Maxwell*, 4 John. Ch. R. 609.)

II. The proof in the cause clearly shows that the testator in making this charge upon the farm, by accident and erroneously described the bond as having been executed to Henry Onderdonk when he meant and intended a bond made by him to Margaret Schenck;

Because, 1. He had given no bond to Henry Onderdonk.

2d. Henry Onderdonk had loaned the money for which this bond was given, and had in relation to the investment of the money and the payment of the interest, acted as the agent of Margaret Schenck.

3d. H. Onderdonk was a relative of the family and intimate with the testator.

4th. The whole testimony on this point being uncontradicted, and not even an attempt to contradict having been made, the intention becomes *prima facie* apparent.

III. There is no evidence in the cause to authorize the presumption that the testator did not intend to charge the premises in question with the payment of this bond. The mere declaration of the testator that he was to pay this bond, made before the execution of the will, (even if proved) cannot be held to impair the solemn direction of his will. That the bond should be paid out of the premises devised to Lambert Wyckoff for whose benefit it was originally given.

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IV. The executors of Peter Wyckoff having taken up and cancelled this bond out of the personal estate, are entitled to stand in the place of the obligee in the bond and to have the benefit of the charge upon the premises.

V. The note set forth in the answer of the defendant, the Merchant's Exchange Bank, is not a valid and subsisting charge upon the premises.

Because said note being at the time of the testator's death in the hands of Lambert Wyckoff the maker thereof, not negotiated and the endorsement thereof being without consideration, the same was without vitality or legal inception.

Because by the death of the testator the implied authority given to Lambert to negotiate the same in such way as to make the testator liable thereupon, must be deemed to have been revoked. And lastly because the Merchant's Exchange Bank discounted the note with knowledge and notice of the testator's death. (*Chitty on Bills*, p. 391, 5th Lond Ed.; 3 *Espinasse*, 108; *Lansing v. Gaine*, 2 Johns. R. 301; *Marvin v. McCollum*, 20 John. 289; *Munn v. Commission Company*, 15 John. 55; *Powell v. Waters*, 8 Cow. 686; *Downes v. Richardson*, 5 Barn. & Ald. 674; *Cutts v. Perkins*, 12 Mass. 206.)

VI. The premises being also charged with the payment of the debts which Lambert Wyckoff owed to his father upon his notes or obligations; the same constitute a valid charge thereupon, and are entitled to be paid out of the proceeds of the sale thereof, according to the amounts admitted in the stipulation between the solicitors in the suit.

VII. The conceded fact that for several of the debts in the last point mentioned the testator held sureties, will not entitle such sureties to claim that the proceeds of the sale of the farm should be applied *pro rata* on all those debts, because in case of a deficiency the representatives of the testator would lose *pro tanto* the benefit of such suretyship; such a result would defeat the plain and manifest intention of the testator, which was to benefit and protect the legatees of his personal estate. The charge is general and cannot be considered as a security given by the debtor or obtained by the creditor. It is simply a disposition made by the testator of his own property, with the sole object of doing equal

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justice among his children. The law of suretyship, and of the surety's rights to have the benefit of all securities obtained for the debt for which he is liable, do not apply in such a case, and the court can only properly effectuate the intention of the testator, by declaring that the proceeds of the sale of the farm (after payment of the testator's own debts charged thereupon,) shall be first appropriated in payment of the debts of Lambert Wyckoff for which there is no security. (*Wade v. Cooke*, 2 Sim. 155; *Richardson v. Wash. Bk.*, 3 Metcalf, 536; *Blackstone Bk. v. Hill*, 10 Pick. 129.

VIII. The term *debts* as used by the testator in his will, must be deemed and taken to mean the amount actually due from Lambert Wyckoff at the time of the testator's death. Interest therefore upon the principal of all said debts, is to be calculated up to that time.

Mr. Martin, for the Merchant's Exchange Bank made the following points.

I. Every note or obligation which Peter Wyckoff at the time of making his will or at his decease had signed with or endorsed for Lambert Wyckoff, and for which Peter then was or should thereafter become liable, or for which his executors or administrators should become liable, is a direct charge on his real estate devised to Lambert, and so made by the express terms of his will.

II. The note for \$6000 was in existence at the time of the making of the last will of Peter Wyckoff, as one of the debts of the testator, and having been afterwards transferred to the bank before it became due, for a valuable consideration and in the ordinary course of its business, for the benefit of Lambert his son, and duly protested against his executors, they thereby as well as by their admission, became liable to pay it out of the personal assets of the testator, if not otherwise provided for. This brings it within the class of debts which the testator intended to charge on the real estate devised to his son Lambert Wyckoff, and it having been in existence at the time of the making of the will of Peter Wyckoff, it is to be presumed he had it in contemplation as one of the debts with the payment of which said real estate is charged. (*Canfield v. Gibson*, 13 Martin's Louis. R. 142, 145; *Pinkerton*

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v. *Bailey*, 8 Wend. 600; *Violett v. Patten*, 5 Cranch, 142; *Usher v. Dauncey*, 4 Campb. 97; *Mandeville v. Welch*, 5 Wheat. 277; 4 Mass. R. 45; Dougl. 513; 2 Paige, 509.)

III. An indorsement of a bill or note, implies an undertaking by the person making such indorsement, to every other person to whom the bill may afterwards be transferred, that the drawer shall pay the same at maturity. (*Bailey on Bills*, 148, and cases cited; *Russell v. Langstaffe*, Dougl. 514.)

IV. This holds true although the endorser die before transfer made, for if a bill or note be transferred after the death of any party to it, the party to whom it was transferred, will have a valid claim against the personal representatives of the deceased party. (*Bailey on Bills*, and cases cited, p. 145; *Perry v. Crammond*, 1 Wash. C. C. R. 100.)

V. If the transfer of the \$6000 note were not valid as a legal indorsement, by reason of the previous death of the testator, yet for the purpose of establishing the equitable claim of the defendants to be paid the amount of the first note for \$5778 56, and interest thereon, out of the real estate of said testator in the hands of his devisee and intended by the testator to be charged with the payment thereof, this court would consider the giving up of the first note and the depositing of the 6000 dollar one, as security for the payment of the debt and interest created by the first, as a mere substitution of one liability for another of the same class and description, both in existence at the same time, both identical in parties, and both at the time of their creation, a charge on the real estate of the party at whose request such substitution was made. Such being the facts, this court will not now permit such party to destroy his own security in the hands of innocent holders for value. (*Perry v. Crammond*, cited above.)

VI. If the defendants, had given up the first note indorsed by Peter Wyckoff under a mistake as to their rights, and had thereby lost all legal claim under the present note for \$6000 against his estate, yet in equity, they would still have a right to come in as equitable creditors under Peter Wyckoff's will, which charged all liabilities which he had then incurred for the benefit of Lambert; no money having actually been paid on any of said notes either by Lambert or his father, and all of them having been in

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existence at the time of making his will and at the time of his death. (*Bank of Sandusky v. Scoville*, 24 Wend. 115; *Pasmore v. Mount*, 13 East, 517.)

VII. The creditors of the testator are entitled to priority in payment over legatees.

Mr. Riker, for John Wyckoff, submitted that in the event of a deficiency, his client as a surety of Lambert, was entitled to the equity of sureties in like cases. If the question were between Lambert and the residuary legatees, the former as devisee would prevail, because the personal estate is the primary fund for the payment of debts. The statute relative to mortgage debts, does not apply to a devise of lands subject to the payment of debts. There must be an express charge of the debts, to exonerate the personalty. The judgment creditor of Lambert is entitled *pro rata* with Nicholas Wyckoff and Mrs. Onderdonk, and has a right to turn them against the personal property of the testator, substituting them for those creditors of the testator who by force of the express charge exhaust the fund in question. The counsel cited *Wilder v. Keeler*, (3 Paige 168;) *Morris v. Mowatt*, (2 ibid. 586;) 2 Rev. Stat. 369, s. 32, 37; Will. on Exec. 1039, Chapt. 2, s. 1, 2; *Bootle v. Blundall*, (1 Merivale, 193;) 4 Kent's Comm. 421, note *d*.

THE ASSISTANT VICE-CHANCELLOR.—I will first examine the question between John Wyckoff and the parties adverse to him. The charges imposed by Peter Wyckoff on the farm devised to Lambert, may be thus classified.

1. The annuity to the widow of the testator; which all concede to have preference over the others.
2. Notes and obligations which the testator had signed with Lambert or indorsed for him. Two debts of this class were specified in the will.
3. Debts owing by Lambert to Nicholas and to Mrs. Onderdonk.
4. Debts which Lambert owed to the testator.

The question arises on the claim made by Lambert's sureties

to have the last class of debts placed upon an equal footing with the others.

There is no doubt of the equity of the sureties to have Lambert Wyckoff's property made liable in the first instance, to the payment of the debts for which they are obligated with him.

The point in dispute is, what interest in the farm devised to him, became his property?

It is manifest from the will, that the testator did not intend to give any part of the farm to Lambert, leaving the obligations which he had incurred for Lambert, to be a burthen upon that portion of his estate which he gave to others. His language in effect is, that after these obligations are paid out of this farm, Lambert may have it subject to the other charges. The farm was the testator's. He had no idea of giving it to Lambert, and paying Lambert's debts also. And before Lambert can have the farm, either for his own use or to pay his own debts; it must exonerate the testator's estate from his liabilities incurred for Lambert's benefit.

I have no doubt but that the second class of charges is to be paid in full, before any of the debts belonging to the third or fourth classes.

In regard to these two classes of debts, I think the testator designed to place them on the same footing. It is true, the fourth class to be paid, constitutes a part of his personal estate which is given to other legatees, and in case of a deficiency, the personal estate, on this construction, will be abridged in favor of Nicholas Wyckoff and Mrs. Onderdonk. On the other hand, those creditors are his children, and one of them is a legatee of the personal estate; and there is no express discrimination made in the will between Lambert's debts to them, and those which he owed to the testator. It is not probable that the testator anticipated any deficiency; and the character of the two classes of demands, is not such as to enable the court to infer a preference in favor of one over the other, or of a portion of one class over the residue.

Therefore in respect of the fourth class of debts, the sureties of Lambert have no right to have the debts for which they are responsible, paid before the other debts which he owed to the testator; nor are the legatees of the personal estate entitled to have

Lambert's debts which are not secured, first paid, to the postponement of the surety debts.

Next, in reference to the charge in the will for the payment of the testator's bond, described as *given* to Henry Onderdonk for Lambert's use. There is no doubt but that by this description the testator intended his bond executed to Margaret Schenck, for \$1500. There was no bond payable to Onderdonk. The bond to Schenck was for Lambert's use; was negotiated through her agent Onderdonk; delivered to him, and in that sense was *given* to him, and all the business in regard to the loan and the payment of interest, was transacted with him. The evidence is competent to show that the Schenck bond was intended.

The executors having paid the bond to Schenck, are entitled to be subrogated in her place, in order to enforce the charge for its payment imposed on the farm by the will.

The principal difficulty in the case, grows out of the claim of the Merchants' Exchange Bank, upon their note indorsed by the testator.

They have no right of action on the note which they held at the testator's death. That note was not protested when it became due, but was delivered up to the maker, on their receiving the note in question.

Peter Wyckoff died on the 20th day of September, 1842. On the 17th day of December following, Lambert W., in order to renew his note indorsed by Peter W., which then matured; gave his new note to the bank, and deposited as collateral security for its payment, the note in controversy, made by himself, and payable to and indorsed by the testator, Peter W. This note was dated December 13th, 1841, and was payable two years after date.

There is no doubt but that the claim of the bank is meritorious, and it will be exceedingly hard if in the renewal of Lambert's note, they have without intending it, lost the benefit of his father's liability for the debt. I approach the examination of the point, with an earnest desire to find the law of the case in their favor. It is nevertheless a pure legal question, upon ascertained facts; one which may not be swerved by any hardship, or any feeling of sympathy.

It must be assumed that the bank had notice of the death of

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Peter Wyckoff, at or before the time they received the note. The cashier saw his death announced in the newspapers, which in the usual course of things, must have been within a day or two after it occurred. And it appears by the testimony of William Wyckoff, that pending the negotiation of the renewal of Lambert's note, the death of Peter W. was a subject of conversation between Lambert and the president of the bank.

This note indorsed by the testator, is to be treated as an *accommodation note*, while in the hands of Lambert Wyckoff. It was suggested that it should be inferred in favor of the bank, that the note after being indorsed, had been put into circulation, and had come to the hands of Lambert, for value, in the course of trade. But this inference cannot be upheld. Lambert being the principal debtor, the payer of the note; on its returning to him after being in circulation, it would be simply paid and extinguished. (*Bartrum v. Caddy*, 7 Ad. & E. 275; *Lazarus v. Cowie*, 2 Gale & Dav. 407.)

One legal consequence of the fact that this was an accommodation note while it remained in Lambert's possession, is that it had no vitality or existence as a contract, until he parted with it to the Merchant's Exchange Bank.

The test of a valid note, is the right of the holder to maintain an action upon it against the parties to it, provided it were due. (*Munn v. The Commission Company*, 15 Johns. 44, 55, per Spencer, J.; *Powell v. Waters*, 17 *ibid.* 176; S. C. 8 Cowen, 669, 686, 697, 705, per Jones, Chancellor, and Colden and Spencer, Senators; *Marvin v. McCullum*, 20 Johns. 288; *Downes v. Richardson*, 5 B. & Ald. 674.) In the case last cited, three persons joined in making an accommodation bill, as drawer, acceptor and first indorser. It was afterwards altered in its date, and was then issued to H. for value, without being stamped anew. The court decided that no fresh stamp was necessary; the bill having been altered before it was issued, in point of law. Abbott, Ch. J. said it first became a bill of exchange, when it was issued to H. for a valuable consideration. And Best, J. likened it to a bond, in form, perfect before delivery. He said the bill was perfect in form, but did not constitute a valid contract between the parties.

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The same principle is established in *Abrahams v. Skinner*, (12 Ad. & El. 763,) which will be more fully stated hereafter.

It is clear therefore, that up to the 17th of December, 1842, while the note was held by Lambert Wyckoff, neither Peter Wyckoff or his estate, were liable or obligated by reason of his indorsement on the note.

What then was the effect of the transfer to the bank? Did it give vitality to the indorsement as against the estate of Peter Wyckoff, and make it a liability which his executors might be compelled to pay? *No*

This depends upon the authority conferred by an accommodation acceptance or indorsement; or which third persons have a right to infer, from such acceptance or indorsement.

Where an indorser commits a promissory note to the maker, with a blank for its date; the act authorizes the maker to fill it up with what date he pleases. (*Cruchley v. Clarence*, 2 M. & S. 90; *Mitchell v. Culver*, 7 Cowen, 336, and *Mechanics Bank v. Schuyler*, *ibid.* 337, note; 1 Bell's Comm. Laws of Scotland, 391.)

And where one signs his name on an entire blank note or bill, and delivers it to another; he thereby authorizes the latter to write upon it a note or bill, for any sum and in any terms, that he chooses to insert. (*Russel v. Langstaffe*, Dougl. 514; *Violet v. Patton*, 5 Cranch, 142; *Putnam v. Sullivan*, 4 Mass. 45.) It is a general authority, a *carte blanche*, or letter of credit to an unlimited extent.

I might refer to many other adjudged cases, where the power implied, was more or less general. They all proceed upon the principle of a *power or authority*, inferred from the act of signing or indorsing, to bind the party in favor of any person who may receive the paper in good faith, on the credit of his name.

So in this case, Peter Wyckoff's indorsement of Lambert's note, (already filled up, as it is supposed,) was an authority to Lambert to make him liable for its amount, in favor of any party to whom Lambert might negotiate the note.

Was this authority any thing more than a naked power, and as such revoked or terminated by Peter's death? Was it in any

No

respect different from a letter of attorney, authorizing one to sign or indorse a note at a future day?

The death of a party is in general, a revocation of all authorities granted by him, whether express or implied. And ~~if~~ there were a revocation in this instance, by the death of the testator; the bank, having notice of his death, was legally informed of the revocation.

In regard to checks on bankers, it is considered that the death of the drawer, is a countermand of the authority of the banker to pay. (Chitty on Bills, 307; 7th Am. Ed. 1830.)

In *Tate v. Hibbert*, (2 Ves. jr. 112, 118,) where this was conceded by the Chancellor, he inclined to think that payment would not be recalled, if the holder of the check received the amount of it before the banker was apprised of the death of the drawer.

The authority in the case of checks, is almost universally coupled with an interest, and would seem to be less revocable than the power inferred by the indorsement of accommodation bills or notes.

So far as I have been able to discover, there is no adjudged case, nor any treatise, which holds such a power as this to be irrevocable by the death of the constituent. At the same time I should add, that there is no express sanction for the opinion that it is terminated by death.

Many of the authorities however proceed upon the assumption that it is thus terminated; or strongly imply that conclusion.

Thus in *Abel v. Sutton*, (3 Esp. R. 108,) where Lord Kenyon held that if a bill indorsed by a firm is sent into circulation after the dissolution of the partnership, all the partners must join in the indorsement; he said, "I even doubt much if an indorsement were actually made on a bill or note before the dissolution, but the bill or note was not sent into the world till afterwards, that such indorsement would be valid."

In *Lansing v. Gaine and Ten Eyck*, (2 J. R. 301,) it was held by Chief Justice Kent, that a note signed by a firm, had no force while in their possession, and if not issued till after the dissolution of the partnership, it would not bind the partners who did not assent to its being issued.

In *Usher v. Dauncey*, (4 Campb. 97,) F. a member of a firm

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drew a bill in blank in the name of the firm, payable to their order, indorsed it in their name, and delivered it to a clerk to be filled up and used as the exigencies of the partnership might require. F. died, and soon after, the bill was filled up by the clerk and dated by him prior to the death of F., and it subsequently came to the hands of indorseees for value, in good faith. The surviving partners being sued as drawers, insisted that after the death of F. the blank to which he had affixed the partnership name, became a nullity, on the ground that the power he gave to fill it up as a bill of exchange, expired with him. But Lord Ellenborough held that the power must be considered to emanate from the partnership, not from the individual partner; and that therefore after his death, the bill might still be filled up *so as to bind the survivors*. The King's Bench sustained the ruling of the Chief Justice at *Nisi Prius*.

It is evident that in *Usher v. Dauncey*, no one thought of holding the deceased partner liable by reason of his use of the name of the firm. The whole contest between the parties, assumed that as to him the authority expired upon his death. And it appears to have been a conceded point, that if the power implied, was merely that of the partner who signed, it terminated with his existence. But the court held it to be a power granted by the whole firm, which though revoked as to F. by his death, continued unimpaired as to the survivors, and that they were liable precisely as if they had originally drawn and indorsed the bill without F.

The cases of *Downes v. Richardson*, (5 B. & A. 674,) and *Abrahams v. Skinner*, (12 A. & E. 763,) are analogous in principle.

There is another class of cases, of which some were cited by the counsel for the bank, which I think in effect sustain the position that the authority implied by the indorsement, in general, terminates with the life of the party. They all proceed on the familiar principle, that a power coupled with an interest, is not revocable.

Thus Judge Washington said (in *Perry v. Crammond*, 1 Wash., C. C. R. 100,) that a person with whom certain bills of exchange had been deposited by the drawers for the purpose of

being filled up with a date and the name of a drawer, and which had been used to raise money for their benefit ; might after the death of the drawers, accept the bills, insert a date prior to that event, and deliver them to one who had previously made advances on the faith of the bills. In that case, the bills at the death of the drawers, were in the agent's hands unused, and they were in fact issued afterwards for a precedent debt, to parties who knew of the death of the drawers ; and it was decided that the holders could not recover against the representatives of the drawers.

The decision, as well as the *dictum* of the learned Judge, appear to me to be a clear concession, that those bills could not be put into circulation after the death of the drawers, except upon a previous advance, so as to be available to any holder who was aware of their death, and of the fact that they were issued after that event.

In *Cutts v. Perkins*, (12 Mass. 206, 210,) the drawer of a bill delivered it to the payee for value, and died before it was accepted. The court expressed their opinion that the bill being valid against the drawer in the hands of the payee, the acceptance after the drawer's death was binding.—And they say that where the authority is coupled with an interest, the death of the drawer will not be a revocation of the request of the drawee to accept. The case was nevertheless decided on another point.

The case of *Billing v. Devaux*, (4 Scott's New Rep. 175—, S. C. 5 Lond. Jur. R. 1182,) sustains the opinion put forth in *Cutts v. Perkins*. Coltman, J. in substance gives as one reason for the decision, that the bill having been put in circulation, the death of the drawer could not affect it.

The principle, differently applied, is also found in *Peyton v. Hallett*, (1 Caines, 363, 379.) And see *Simon v. Lloyd*, (2 Crompt. M. & R. 187.)

In *Hammonds v. Barclay*, (2 East, 227,) a factor accepted bills, on the strength of the consignment to him of a ship for sale. The ship came, but it was sent by the executors of the drawer, which the factor knew. He sold the ship and applied the proceeds to his acceptances, retaining for such as had not matured ; and this was upheld.—But see *Copland v. Stein*, (8 T. R. 208.)

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An executor may sign the name of his testator as drawer, to a blank or unsigned bill, (meaning acceptance,) found in the testator's repositories; and may raise diligence upon it. And such a bill may be signed by the drawer, after the death or bankruptcy of the acceptor, or at any time before producing in judgment. (1 Bell's Comm. 391, 395, 6.) This of course assumes that the bill is held by the decedent for value.

The cases to which I have referred, are all consistent, and all appear to concede distinctly, or by implication; that the authority to put a bill or note into circulation, inferred by signing it, is revoked if the party die before it is issued. When it is, or of right should be, in the hands of one who has acquired an interest in it, the rule does not apply, because the paper is then issued, and the authority has been exercised.

It is contended that the note must be held to have been issued, *by relation*, at the time of its date.

In aid of this point, it is said a note is presumed to have been made, at the time when it purports to have been made.

There is no doubt of this, but here the proof is conclusive that it was not *made*, in the legal sense, until December, 1842, and the presumption relied upon is overcome.

The counsel for the bank referred to *Usher v. Dauncey*, before cited, as an authority for giving effect to the note by relation. I have already commented on the case, and need not speak of it farther.

The case of *Snailth v. Mingay*, (1 M. & S. 87,) is the strongest one in favor of the bank, that I have met with on this point of relation. There the question was upon copper-plate impressions of four bills of exchange, signed as drawers, in blank in Ireland, by a firm doing business there, and transmitted to one Wallace in London, to be filled up and used for his accommodation. The latter made use of the bills accordingly. They had been stamped with an Irish stamp, when the drawers signed. It was insisted that the bills were drawn in England, and being inland bills, required an English stamp. The court decided that the bills were drawn in Ireland. They put it upon the ground of relation, when the bills became perfect, to the time when they were signed.

by relation
Wyckoff

Bayley J. says if the drawer had died while the bill was on its passage, and afterwards the blanks had been filled up and the bill *negotiated to an innocent indorsee*; he should think the representatives of the drawer would have been liable.

Scarlett, *arguendo*, contended that the signature of the firm as drawers, was in the nature of a power of attorney to Wallace to draw bills in their names.

It may be observed of *Snaith v. Mingay*, that the relation, upon which the court acted, was one of *place*, and not of *time*. The illustration of Bayley J. was by reference to a relation in point of time. The question was simply, *where* were the bills issued? They acquired vitality for the first time in London, but the drawers residing in Ireland, having actually signed the bills there, and Ireland being the place where they were to be notified of their non-payment, and called upon to pay them, it was held that they were foreign bills. It would have been no defence by the drawers against a claim for damages on non-payment, to have shown that the bills were first issued in London, and therefore were inland bills. The whole question was one of locality, in reference to the revenue of the government from stamps. This appears by *Crutchley v. Mann*, 5 Taunt. 529, where the same question arose upon a bill drawn in Jamaica, upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bona fide* holder inserted his own name as payee; and it was decided that an English stamp was not necessary. (See *Downes v. Richardson*, *ubi supra*.)

This is further shown by the case of *Abrahams v. Skinner*, (12 Ad. & E. 763.) There in June, 1833, the defendant gave a blank acceptance on a proper stamp. In November following, the die of that stamp was discontinued, and a new stamp used pursuant to a statute. In 1835, a bill was drawn upon the blank acceptance, without a fresh stamp. It was held that the bill could not be considered as existing by relation from the time of the acceptance; and therefore it was not properly stamped. Lord Denman said, "Upon the day when the old stamps were discontinued, the bill in question had, in fact, no existence."

The case of *Snaith v. Mingay*, was relied upon, and the Chief Justice, without expressing any opinion upon the de-

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cision, drew a distinction between that and the case in hand, founded on a difference in drawing a blank bill, and in accepting one in blank.

Neither case having the force of authority here, I am at liberty to say what Lord Denman evidently felt, that the ground of *relation to the time of signing*, which was adopted in *Snaith v. Mingay*, was inconsistent with the principle that a bill has no legal existence before it is issued. And *Abrahams v. Stephens*, in effect, overrules *Snaith v. Mingay*.

Pasmore v. North, (13 East, 517,) was also cited by the counsel for the Bank. North on the 4th of May, drew a bill at 65 days, and dated it on the 11th of May, in favor of Totty, who, on the 5th of May, indorsed it to Pasmore for a valuable consideration. It was a business bill, given for goods, part of which had been delivered, and a part were to be delivered subsequently. Totty was accidentally killed on the 5th of May, and North refused to pay the bill on the ground that Totty could not transfer it prior to the day of its date. The court held that the transfer was valid. The counsel for the defendant there argued for a *relation forward*, insisting that the indorsement was with reference to the time of the date, at which time only the bill could be deemed as issued.

It appears by *Pasmore v. North*, that the date of a bill is not material, except to fix the time at which it is payable. And when it is said that a bill drawn for a blank sum, or an accommodation bill, when filled or issued, takes effect as of its date, or relates to that period, it is said in reference to the time and terms prescribed for its payment, and its intermediate transfers.

The authorities appear to be insuperable against giving effect to the note of Peter Wyckoff, upon this doctrine of relation.

Partnership signatures placed upon a bill or note, before dissolution, or as of a date prior to that event, which is issued subsequently, furnish an analogous case; one which is of more frequent occurrence than that of the death of an indorser before issuance, and equally likely to be productive of hardship to purchasers of notes and bills.

Yet it is clearly settled, that no such relation to the date of the paper, is permitted in the instance of partners. (*Lansing v. Gaine and Abel v. Sutton, ubi supra*; Story on Part. 248.)

So the relation is not held, in regard to the date, under the stamp acts in England. (*Downes v. Richardson*, and *Abrahams v. Stephens*, before cited.) The cases of *Perry v. Crammond*, and *Usher v. Dauncey*, are entirely consistent with these. And such a relation is utterly at war with the great principle, that a note or bill is not *issued*, until it is delivered to a party who can maintain an action upon it, and until then it has no vitality or legal existence.]

The doctrine of *escrow*, technically appertains to instruments under seal ; but its principle if applied to this case, will not sustain the indorsement. There was no *conditional delivery* of this note, no specified event upon the happening of which it was to become available or absolute. *Cox v. Troy*, 5 B. & Ald. 474—*Pothier, Traité du Contrat De Change*, d. 44 ; P. 1, Ch. 3, S. 3.)

While a bill which is already issued, is in the hands of the drawee, he may revoke his acceptance, of it after he has written it upon the bill, at any time before the bill is delivered to the holder, or the fact of his acceptance is communicated to the holder. (*Cox v. Troy*, 5 B. & Ald. 474—*Pothier, Traité du Contrat De Change*, d. 44 ; P. 1, Ch. 3, S. 3.)

An accommodation indorser has or should have as much control over his signature, while the paper remains in the hands of the person to whom he has lent his name and who is acting in respect of the note, by force of his authority, and in effect, as his agent.

My conclusion is, that the death of Peter Wyckoff was a revocation of the power which by his indorsement of the note in dispute, he had conferred upon Lambert Wyckoff ; and that Lambert had no authority to issue the note after his death, so as to make it an obligation of the testator.]

"In all that I have said, and in my conclusion, I do not intend to go a step beyond this case, in which the bank receiving the note, although they paid a full consideration, took it from the makers with notice of the death of the accommodation indorser. They received it in good faith, for value, *with notice of the defect*. But for the latter circumstance, their claim would have been of a totally different character.)

In regard to the manifest intention of the testator to make himself liable by means of this indorsement—the intention is

no more obvious than it would have been, if in December, 1841, he had given to Lambert a power of attorney authorizing him in December, 1842, to indorse his note for \$6000. No one would doubt but that he expected to become liable for the \$6000; yet no one would imagine that after his death, Lambert could make him liable by executing the power.

It is moreover unsafe to speculate on the views and expectations of a man in furnishing blank indorsements to his son. It is more probable that he expects to have a voice and influence in their use, than that he means to subject himself and his family to their consequences for an indefinite period, and without reference to his life or death.

The counsel for the bank argued that this was a note in existence at the date of the will, and therefore a direct charge upon the real estate of the testator by the express terms of the will.

The charge on the farm is only for debts signed with or indorsed for Lambert, *for the payment of which the testator or his executors then was, or might be liable*. Now this note was not a debt for which the testator was then liable. It had not been issued, and legally was not in existence. And in my view of it, neither he or his executors became liable for it.

If the testator had in view Lambert's debt to the bank, when he made his will, it was not this note, but the one then held by the bank which he intended to make a charge, and from the latter his estate was discharged.

As to the one being a substitution for the other, the bank doubtless so intended it, but as I am compelled to adjudge the law to be, such a substitution could not be made after the testator's death.

Another point was, that the court will not permit Lambert to avoid this charge on his real estate, he having procured the substitution. But this does not apply to the issue. The farm is not Lambert's property until the charges imposed on it by the testator are paid. After those are provided for, the debt of the bank is unquestionably valid against Lambert's interest in the farm.

The recognition of the note by one of the executors, was not much pressed. It can not be used to sustain the claim upon the

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note, because there is no evidence that it was made with any knowledge or information, that the bank received the note from the maker, after the death of the testator. This reason suffices, without referring to any others. (See *Tebbets v. Dowd*, 23 Wend. 397; *Cayuga County Bank v. Bennet*, 5 Hill, 236; *Same v. Dill*, 5 *ibid.* 403.)

There must be a decree accordingly, for taking an account of the various charges, and for a sale or mortgage of the farm, to the end that they may be paid.

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A trustee is not liable for the waste or dereliction of his co-trustee, which was not occasioned by any act or agreement of the former.

A testator held a bond and mortgage in his own name, for moneys invested by him for C. By his will he appointed four executors, who all qualified, and who consented that one of their number, H., should take the management of the estate.

The bond and mortgage came to the hands of the executors, with the other effects of the testator, and passed into the custody of H., as the acting executor. C. was aware of this disposal of the securities, but did not object or dissent. H. subsequently received a large sum on the bond and mortgage, expended it for his own use, and died without any property. *Held*, 1. That on the death of the testator, his executors succeeded him in the trust, and held the bond and mortgage as C.'s trustees. 2. That the permitting H. to have their actual custody, was not a breach of trust. And 3. that C. could not recover from the other executors, the amount received and squandered by H.

Feb. 20; October 21, 1845.

THE bill was filed in January, 1842, by William Banks, as the administrator of James Campbell, and as the executor of Margaret Campbell, deceased, against Janet Wilkes, executrix, and George Wilkes and Hamilton Wilkes, surviving executors of Charles Wilkes, deceased.

The facts established, upon which the decision of the court was made, were these:—

Charles Wilkes, for many years, was the banker of James Campbell, residing in New Jersey, and as his agent, invested

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moneys from time to time. In 1831, James Campbell died, leaving a sister, Margaret Campbell, his sole legatee and executor. Mr. Wilkes continued to stand in the same relation to Miss Campbell, as he had to her brother, until his own death in the summer of 1833. At that time he had in his hands, invested for Miss C., (the securities being in his name,) \$26,000, of which \$15,000 stood in the bond and mortgage of Samuel Wilkeson. After his death, his executrix and executors took out letters testamentary, and then, pursuant to a request of the testator, arranged among themselves, that Horatio Wilkes, one of their number, should have the active management and charge of the estate. Miss Campbell's securities, thus came into his custody, being found among the assets of C. Wilkes. Annual accounts were rendered to Miss C. by Horatio W., showing the amount and investment of the fund. The accounts were headed "with the estate of Charles Wilkes," and signed by Horatio as executor, but with each was his written acknowledgment of holding the securities for her, which stated that *he* held them, and that they were in *his* possession. She received the income from him in sums of \$200 or \$300, as she wanted it, and gave receipts, all of which run in his name without any addition of executor. And when he drew checks in her favor, they were signed in his individual name. Miss Campbell was intimate with the family of the testator, and occasionally spent a day or two at their house. She never made any objection, or expressed any dissent to the course taken with the custody and management of her securities. In November, 1838, it transpired that Horatio W. in May, 1835, collected \$6000 of the principal sum secured by S. Wilkeson's bond and mortgage, and used it for his own purposes, or invested it in some speculation whereby it was wholly lost. Miss Campbell thereupon called on the other executors of C. Wilkes, to transfer all the remaining securities, and to pay her the amount thus lost by Horatio. They consented to and did join in a formal assignment of the existing bonds and mortgages, belonging to Miss C., reserving the question of liability for the \$6000 received of Wilkeson, and they declined to pay any part of that sum.

Horatio Wilkes died in March, 1840, intestate and destitute of property. Miss Campbell died on the sixth of April following,

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leaving a will by which Mr. Banks was appointed her executor, and he became the administrator *de bonis non* with the will annexed, of James Campbell.

The bill prayed for an account and settlement of the trust fund originally held by Charles Wilkes, and insisted that his surviving executors were liable to make good the sum received by Horatio Wilkes.

The cause was argued in writing with much fulness on all the questions presented by the pleadings and proofs.

Richard H. Ogden, for the complainant.

Charles E. Butler, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—At the time of the death of Charles Wilkes, the bond and mortgage of S. Wilkeson, which ultimately became the cause of this controversy, although payable to him, were clearly identified and distinguished as being the property of Margaret Campbell ; and after his death they were recognized and treated as hers by his representatives.

The securities came to the hands of his executors, with the testator's effects upon his death.

It is agreed on all hands, that Mr. Wilkes held the bond and mortgage, *in trust* for Miss Campbell. And it appears to me to be quite immaterial, whether this trust was express or implied, direct or constructive.

In *Trecothick v. Austin*, (4 Mason's R. 16, 29,) the question was whether a statute of limitations, barring suits against executors in their capacity as such, applied to a transaction similar to this in principle ; and it was decided that it did not. Judge Story held, that "if at the time of the testator's death, there is any specific personal property in his hands, belonging to others, which he holds in trust, or otherwise, and it can be clearly traced and distinguished from the testator's own ; such property, whether it be goods, securities, stock, or other things, is not assets ; but is to be held by the executor, as the testator himself held it." And, "coming into the executor's hands, as the general represen-

tative of the personalty, he is by law clothed with the same character of trustee of the property, and succeeds to its obligation."

It is insisted on behalf of the defendants, that by the statute relative to uses and trusts, the trust in question upon the death of Mr. Wilkes, devolved upon the court of chancery.

I think the statute is not applicable. It relates exclusively to real property, and its provisions are not extended to personalty, except in limitations of future or contingent interests in such property.

The interest of Miss Campbell in this trust was a present and vested interest, and does not fall within that class of limitations.

If the other construction were correct, and the trust devolved upon the court of chancery; it would not warrant the executors in delivering the fund to any person other than the beneficiary, or a new trustee appointed by the court.

The defendants state in their answer, that shortly after Mr. Wilkes's death, the securities belonging to Miss Campbell were taken possession of by Horatio Wilkes as her trustee in fact, or agent, and were from thenceforth kept and retained by him exclusively in that capacity.

The complainant, denying that Horatio W. was the sole trustee or agent of Miss C. at any time, argues that the act of placing these securities in his hands, or suffering him to take the possession of the same, was a breach of trust on the part of his co-executors, which subjects them to all the consequences flowing from his control over the securities.

It is true Horatio Wilkes, in conformity with his father's request, and from its fitness in reference to the situation and pursuits of the other executors, became the acting executor and manager of the estate. All assented and agreed to this arrangement; but I do not understand from the testimony that his co-executors divested themselves of their legal control over the property, nor but that they could assume its management if they thought proper. I have no doubt but that Miss Campbell's securities, in the first instance, passed into the hands of Horatio Wilkes, in consequence of this family arrangement, with the mass of the personal estate of Charles Wilkes.

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But I do not discover any breach of trust in this circumstance. There is no proof that the defendants agreed to intrust the control and management of Miss C.'s securities to Horatio, or that they interfered in any manner in regard to them. The defendants were simply, passive; suffering them to pass into his custody.

After he had thus received them, the executors stood in this position. They were the trustees of the bonds and mortgages of Miss C., and one of their number, Horatio Wilkes, had the same in his keeping. The four trustees could not all have the manual possession of the securities. Nor could any joint possession of them prevent one of their number from receiving payment from the mortgagors, without the concurrence or knowledge of the others, if he chose so to do.

The circumstance of the individual custody of the trust fund, by one of the trustees, is not therefore to be deemed a breach of trust in the others. (*Sutherland v. Brush*, 7 J. C. R. 17, 22.)

If the rule of law were otherwise, it would not apply to this case, because Miss Campbell was informed, when she received the first account current from Horatio, a few months after his father's death, that he alone had the bonds and mortgages in his possession, and she did not object to that disposition of them or intimate any dissent. Irrespective of the question as to his becoming the sole trustee, her silence after this information, must be deemed an acquiescence in Horatio's being the custodian of the securities as one of her four trustees.

The loss in question occurred before there was any known reason or cause for the defendants to interfere with Horatio's possession of the bonds and mortgages. He received the \$6000, without the concurrence or knowledge of either of them, and his sole acquittance, it is conceded, was sufficient to discharge the debtor.

The law appears to be well settled that the defendants are not liable for the money which he thus received. (2 Story's Eq. s. 1281, to 1284; *Monell v. Monell*, 5 J. C. R. 296, 297; *Sutherland v. Brush*, 7 *ibid.* 22; and *Manahan v. Gibbons*, 19 Johns.

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438, 440, per Kent, Chancellor; *Leigh v. Barry*, 3 Atk. 584; Lewin on Trusts and Trustees, 269.)

There was no act or agreement in this case, within the meaning of the authorities cited on the part of the complainants, by which this money came into the hands of Horatio Wilkes.

Entertaining this view of the subject, it is unnecessary for me to examine the facts relied upon by the defendants, to show that Miss Campbell recognized Horatio Wilkes as her sole trustee, and acquiesced in his acting in that capacity.

The bill must be dismissed without costs.

P. and H. Y. ROGERS v. LUDLOW and others.

A conveyance of real estate, in trust to lease the same and to pay and apply the income unto such persons, for such uses and purposes, and in such parts and manner, as E., a married woman, should in writing appoint; and for want of such direction, then to her proper hands; or otherwise to permit her to receive the income for her sole and separate use and benefit; is valid as an express trust.

Such a trust interest in real estate, cannot be subjected to the payment of liabilities, in the nature of debts, created by the wife.

If the conveyance were deemed to create a valid power in trust, instead of an express trust, such liabilities would not be enforced against the wife's interest, under the provision of the revised statutes for compelling the execution of powers in favor of the creditors of the beneficiary.

A married woman cannot incur a debt; and where she has a separate estate, her obligation incurred on the faith of such estate or for its benefit, is enforced, (when capable of being enforced,) as a charge, and never as a personal liability.

May 9, 10, and October, 4; October 23, 1845.

THE bill was filed against Mrs. Elizabeth Ludlow and Edward H. Ludlow and Elizabeth his wife, to obtain payment, out of the separate estate of the latter, of an account for merchandize, charged to have been sold and delivered to her by the complainants, on the faith and credit of such estate.

It appeared that Mrs. Edward H. Ludlow as the daughter and one of the heirs of Elizabeth Stevens Livingston, inherited an undivided share in real estate in New York, New Jersey, and else-

where; in which her father Edward P. Livingston had an estate as tenant by the curtesy, until his death on the 3d of November, 1843. On the 8th day of February, 1837, a post-nuptial settlement was executed by E. H. Ludlow, by which he granted bargained, sold, released, conveyed and confirmed, unto his mother Mrs. Elizabeth Ludlow, in fee, all his estate, right, title, interest, claim and demand, in right of his wife, or otherwise, of in and to all the lands and tenements of which Mrs. Livingston died seised. The conveyance was upon certain trusts, which were expressed as follows:

"To and For the Uses Trusts and Purposes following that is to say, Upon Trust that the said party of the second part her executors administrators and assigns do and shall from time to time lease let and improve the said above referred to premises or any part thereof, to the best advantage and for the most profit and income the same can reasonably produce, according to the best of her or their judgment or discretion, or according to and in pursuance of such directions as the said Elizabeth Ludlow wife of the said Edward H., shall at any time notwithstanding her coverture, by and in writing under her hand direct or appoint, and do and shall from time to time hereafter pay, apply and dispose of the rents issues and profits of the premises aforesaid, as the same shall from time to time arise and be received, unto such person or persons, and for such uses and purposes, and in such parts and proportions, manner and form, as she the said Elizabeth wife of the said Edward H. Ludlow, (the party heretofore of the first part) from time to time, notwithstanding her coverture, shall by any note or writing under her hand, direct or appoint, and for want of such direction or appointment, then to the proper hands of her the said Elizabeth, wife of the said Edward H., or otherwise shall permit her to receive the same to and for her own sole and separate use and benefit, and her receipt or receipts alone, notwithstanding her coverture, shall be a sufficient discharge from time to time, to the person or persons so paying the same, for so much thereof for which such receipts shall be given, to the intent that the same rents issues and profits, or any part thereof, may not be at the disposal, or subject or liable to the control, debts, forfeitures, or engagements of the said Edward H. Ludlow, but only

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to and for her own sole and separate use, benefit and disposal. And upon the further Trust, that the said party of the second part, her heirs, executors, and administrators, do and shall grant demise or convey the premises above described, mentioned or referred to, to such person and persons, use and uses, estate and estates, and for and in such consideration or considerations, and subject to such provisions, limitations and agreements, as she the said Elizabeth wife of the said Edward H. Ludlow, notwithstanding her coverture, shall by any instrument in writing under her hand and seal, in the presence of one or more credible witness or witnesses, or by her last will and testament in writing, or by any writing purporting to be her last will, to be by her duly executed in the presence of two or more witnesses, which writing, instrument, or will, she the said Elizabeth is hereby and by the said Edward H. Ludlow, her husband enabled and empowered to make, devise, give, direct, limit or appoint, and for want of such instrument, writing, devise, will, gift, disposition, limitation, direction or appointment, then in further Trust, to grant and convey the said above described mentioned, or referred to premises, and every part, and parcel thereof with the appurtenances, to the use and behoof of the right heirs of her the said Elizabeth wife of the said Edward H. Ludlow, for ever."

Much testimony was taken in the cause to prove the sale of the goods, and that the credit was given to Mrs. Ludlow's trust estate; but the decision turned wholly on the legal questions involved.

A. Thompson, for the complainants.

Liv. Livingston, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The bill charges that Mrs. Elizabeth Ludlow, the grantee in the deed of trust, by force of that instrument, became and has ever since been, the trustee of all the property and estate thereby limited to the separate use of Mrs. Edward H. Ludlow; and that the latter has since the date of the deed, been in the full use and enjoyment of such separate estate. It then seeks to recover a debt, which as the bill

alleges, Mrs. E. H. Ludlow contracted with the complainants on the credit of that estate.

The two principal points discussed at the hearing, were the existence of the debt, and the force of the post-nuptial settlement in reference to E. H. Ludlow's life estate in the lands.

As to these points, my impression was very decided, that the debt was established; but that Ludlow had no estate or interest in the lands when he executed the settlement. There was still a question whether his covenants in the deed could be enforced, either by his wife or her creditors, as an equitable settlement, now that he has by the death of Edward P. Livingston, become entitled as tenant by the curtesy.

Since the argument, the opinion of the Chancellor in *L'Amoureux v. Van Rensselaer and wife*, and her trustee Mr. Phelps, (Aug. 5, 1845,) has been published,^(a) and its bearing upon this case was such, that the counsel have been heard anew on the questions presented by the settlement made for Mrs. E. H. Ludlow's benefit.

It is now contended in behalf of the complainants, that the trusts in this settlement do not fall within the section of the revised statutes authorizing express trusts; but they are valid as powers in trust, and as such will be maintained in favor of the wife and of her creditors.

Assuming for the sake of the argument, that the settlement is operative upon some estate or property, I will examine the proposition just stated.

The trusts are, to lease, let and improve the property, so as to produce the best income, or as the wife shall direct; from time to time to pay, apply and dispose of the income as it should be received, unto such persons, for such uses and purposes, and in such parts and manner, as the wife should in writing, appoint; and for want of such direction, then to her proper hands; or otherwise should permit her to receive the same, to and for her sole and separate use and benefit; to the intent that the rents and profits might be to and for her own sole and separate use,

(a) Now reported; 1 Barbour's Chy. Rep 34.

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benefit and disposal, and not at the disposal, or subject to the debts, of her husband. There was a further trust declared, for the conveyance of the property in pursuance of the wife's appointment by deed or her last will and testament;—and in default of her disposal in one or the other of these modes, the estate was to pass to the heirs of the wife.

Without deciding all the questions which have been so well presented in regard to these trusts, it is sufficient to say that several of them, and those which are the most essential to the wife, the party designed to be benefitted, are valid as express trusts. Such is the trust to lease the property, and incidentally to receive the rents. This is a good trust, (in connection with the application of the rents,) under the third clause of section fifty-five of the statute of uses and trusts. The trust to pay the income and to apply it for the use and benefit of the wife, which is the ultimate effect of the limitation as to the disposal of the income, is also a valid trust under the same clause and section.

The Chancellor decided in *Gott v. Cook*, (7 Paige, 521,) that a trust to receive the rents of real estate and pay over the same to the beneficiary for his use, is a valid express trust. (And see *Van Eps v. Van Eps*, 9 Paige, 237.)

This is the settled law in the court of chancery, and therefore the trust to pay, is good in this case, as well as that to apply the income.

The valid trusts in the deed of E. H. Ludlow are sufficient to uphold the title of the trustee, although they may be accompanied with trusts which the statute does not authorize. (*Darling v. Rogers*, 22 Wend. 483; *Kane v. Gott*, 24 *ibid.* 661, 665-6; *Irving v. De Kay*, 9 Paige, 521.)

It follows that Mrs. Elizabeth Ludlow, the trustee, took and still holds, whatever estate or right, was conveyed by the deed in question.

The recent decision of the Chancellor in *L'Amoureux v. Van Rensselaer*, before mentioned, is conclusive that the interest of Mrs. E. H. Ludlow under this trust, cannot be subjected to the payment of the complainant's debt. The trust in that case was of real estate, and the trustee was to pay over the net income to Mrs. Van Rensselaer, for her sole and separate use. And it was

held, that she could not contract any debt which could be made a charge upon the property or its income, because the interest of the beneficiary in these trusts, is inalienable by the 63d section of the statute relative to uses and trusts.

If the complainant's counsel had succeeded in establishing that the deed was invalid for all the purposes of its express trusts, and that the same might be upheld as powers in trusts; still I do not perceive how the bill could be maintained.

There is no direction or appointment of Mrs. E. H. Ludlow, which can operate upon the trustee, within the terms of the deed. But it is said, the 103d section of the article of the revised statutes relative to powers, enables the creditors of any person entitled as one of the objects of the trust, to compel an execution of a trust power, for their benefit.

The complainant's difficulty under this section is, that they are not *creditors* of Mrs. E. H. Ludlow, in the legal sense of the word, or within its meaning as used in the section.

A married woman cannot incur a debt, and where she has a separate estate, her obligation incurred on the faith of it, or for its benefit, is enforced, (when capable of being enforced,) as a charge, and never as a personal liability. (2 Story's Eq. Jur. 625, §. 1397 to 1400.) (a)

A similar section in favor of creditors of a beneficiary under an express trust, as to the surplus income, is contained in the Article relative to Uses and Trusts. (1 R. S. 729, §. 57.) And in *L'Amoureux v. Van Rensselaer*, before cited, the Chancellor said that Mrs. V. R.'s interest could not be reached under that section, because she could not create a debt which should bind her personally, while she was a married woman.

The complainant's bill must be dismissed, but without prejudice to any legal remedy which they may have, and without costs.

(a) And see *Curtis v. Engel*, 2 Sand. Ch. R. 287.

Green v. Burnham.

GREEN v. BURNHAM and BROWN.

IN a judgment creditor's suit, the following objections were held to be untenable, viz:

1. That the direction in the execution at law to levy on the real estate of the debtor, stated the day from which his lands were liable, six days short of the actual liability.
2. That the execution was issued within less than thirty days after the recovery of the judgment.
3. That the sheriff's return on the execution, bore date prior to the return day; it not being shown that he parted with the writ till after the return day.

Ithaca, Sept. 23; October 28, 1847.

THIS was a suit by a judgment creditor of Burnham, in which Brown was made a defendant as having received a conveyance of twelve acres of land in Portage, Allegany county, of which Burnham owned an undivided half.

The interest of Burnham was established, and an effort was made to prove that Brown was privy to a fraudulent design in the conveyance, and thereupon to charge him with costs. The questions principally discussed at the hearing, arose upon sundry objections made by Brown to the complainant's case, upon his proceedings at law. The facts on this head are stated in the opinion of the court; as is the conclusion upon the costs.

L. C. Peck, for the complainant.

Ben Johnson, for the defendant Brown.

THE ASSISTANT VICE-CHANCELLOR.—It is not a valid objection to the execution at law, that it directed the sheriff to levy upon the defendant's lands whereof he was seized on the 1st of February; when the direction might have been given from the twenty-sixth day of January. If the day had been wholly omitted, the sheriff would have been authorized to take all the lands the defendant had when he received the execution; so that the legal remedy was exhausted by the issuing and return of the process. The defendant Brown made two objections to the complainant's case as founded upon this execution:

1. That it was issued within less than thirty days after the

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recovery of the judgment, and is therefore void. This rendered the writ voidable on the application of the judgment debtor; but it does not impair its force as to strangers.

2. The other objection was, that the execution was returned by the sheriff before the end of sixty days from its receipt.

The sheriff's return indorsed on the writ, bears date within the sixty days, but it was not filed till after that term had expired. There is no evidence that the sheriff parted with the possession of the writ till after the sixty days expired; and the return speaks from the date that it was filed in the clerk's office.

There is no force in either of the objections.

The only remaining question is as to the costs, which are claimed against Brown, on the ground that he was privy to a fraudulent intent on the part of Burnham in having the whole title conveyed to him, when he owned no more than an undivided half of the land purchased of Canfield.

I have read the testimony, and do not find any satisfactory proof of Brown's being a party to the alleged fraud;—and he will not be charged with costs.

The complainant is entitled to a decree for his debt, interest and costs out of the undivided half of the land; according to his priority in reference to other creditor's suits.

JOHN G. COSTER'S Executors v. JOHN H. COSTER and others.

A TESTATOR by his will, gave eleven one hundred and sixth parts of his real and personal estate to a trustee, in trust to keep it as it was, or to sell and convey it as he might deem most expedient, and to invest the proceeds in real property or personal securities in his discretion, to collect the rents and income during the life of the testator's son J. and to apply the same to the use of J. during his life, for the support of himself and his family during that time, in sums, time and manner in the trustee's discretion; and after J.'s death the trust was to cease, and the trust fund with all its increase and accumulations, was to be divided and distributed between the children of J. then living, and the issue of his deceased children, *per stirpes*. If J. left no children, the same was to go to the other children of the testator.

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By a codicil, the testator devised and bequeathed all the property, estate or interests, he had by the will devised or bequeathed in trust for the wife and children of J. and their children, heirs, &c. to his son J. and his heirs and assigns, as and for his own proper estate, thereby for that purpose revoking the trust.

Held, on the construction of the will and codicil, that the trust in the will was for the benefit of the wife and children of J., in respect of the sale of the real estate, for the accumulation of the rents and income, and for the application of the same for the support of J.'s family; and that by the codicil, the whole trust was revoked, and an absolute legal estate given to J. in the eleven one hundred and sixth parts of the testator's property.

October 2; October 30, 1845.

JOHN G. COSTER, of the city of New York, died on the eighth day of August 1844, seised and possessed of a very large real and personal estate. He left a last will and testament, dated April 9th, 1842, to which was added a codicil dated December 30th, 1842. The complainants, Gerard H. Coster, George W. Coster and Henry A. Coster, were the executors of John G. Coster.

On the 9th of December, 1844, they filed the bill in this cause, against John H. Coster and Sarah Adeline his wife, and their six children, (all of whom were infants,) together with the heirs at law of the testator, and the other parties by possibility interested in the subject matter, to obtain a construction of the meaning and operation of the will and codicil in respect of eleven equal one hundred and sixth parts of the testator's estate, given in trust for the benefit of his son, John H. Coster, and the family of the latter.

The clause of the will upon which the questions in the cause arose, was in the following words, viz:

"Twelfthly—Of the said rest and residue of my estate, real and personal as hereinbefore described and subject as aforesaid, I give, devise and bequeath eleven one hundred and six parts thereof to Henry Arnold Coster, to have and to hold the same, in trust nevertheless for him to keep the same in its present condition, or to sell and convey the same as he may deem most expedient, and to invest the proceeds thereof in productive real property, or in bonds and mortgages, or stocks, or such other securities as the said Henry Arnold Coster in the exercise of a sound discretion may deem safest and most expedient, and to collect and receive the rents, interest, income and profits of

the proportion of my estate by this clause of my will devised, and of the proceeds thereof, during the life of my son, John H. Coster; and to apply the said rents, issues, income and profits, to the use of my son, John H. Coster, during his natural life, for the support of himself and his family during that time, in such way, manner or form, and in such sums, and at such times, as the said Henry Arnold Coster, in the exercise of a just and reasonable discretion may think proper, and at and after the death of my said son John H. Coster, the said last mentioned trust shall end and determine, and the said eleven one hundred and sixth parts of my estate, together with all the increase and accumulations thereof remaining in the hands of the said Henry Arnold Coster, shall be divided and distributed between and amongst, and conveyed to the children of the said John H. Coster living at the time of his death, and the child or children of every child of his that shall have died before him, in equal proportions, share and share alike, per stirpes, and not per capita."

By the fifteenth section of the will it was provided, that if John H. Coster should die without leaving any children surviving him, then that the share devised as above for his benefit, should be divided among other children of the testator.

The codicil to the will was in these words; "all the property estate or interests whether real or personal, which I have by my said will devised, or bequeathed in trust for the wife, and children of my son John H. Coster, and their children, heirs, or either of them, I hereby devise, and bequeath to my said John, to have and to hold to him, his heirs, and assigns, as and for his own proper estate, hereby for that purpose revoking said trust."

John H. Coster and wife put in an answer, insisting among other things, that the codicil operated as a revocation of the trust in the will above set forth, and that he was entitled to receive his proportion of the income of the estate, freed from the trust. And they alleged that the sole object of the testator in making the codicil, was to revoke the trust in question.

The infant defendants answered by their guardians *ad litem*, and the cause was heard as to them on the proofs taken. The other defendants suffered the bill to be taken as confessed.

Coster's Executors v. Coster.

C. E. Butler, W. M. Evarts and J. Prescott Hall, for the complainants and the parties in interest adverse to John H. Coster.

Dudley Selden, for the defendant John H. Coster.

THE ASSISTANT VICE-CHANCELLOR. By the twelfth article of the will, the absolute property in 11-106 parts of the personal estate was bequeathed to Henry A. Coster, in trust. As to the 11-106 parts of the real estate of the testator, he took an estate in trust, equal at least in duration, to the life of John H. Coster. Indeed, as the trustee was to receive the rents and profits, and was authorized to sell the lands in fee, I do not see any reason why the twelfth article of the will, did not vest in him the whole estate in that portion of the realty. If he converted it into personalty, then upon the death of John H. Coster, it became divisible, according to the terms of the article; and if it remained unconverted, then on the same event, the trust terminated, and the lands were divisible by the same terms and among the same classes. The children of John H. Coster were to have a remainder *in the land*, only in the event of its remaining unsold; so that although their right to the 11-106ths was absolute after the death of John H. Coster, it was entirely contingent whether they would ever have any interest in possession in the real estate of the testator.

The better opinion in my judgment is, that the unlimited discretion to sell and convey all the lands, and the right to receive the interim rents contained in the twelfth article, carried the whole legal estate to the trustee. And at all events, such was its effect as to the existing personalty; and the land when converted, would be held in the same manner. And in the unsold lands, there was given at least, an estate for life, in trust.

In the next place, this trust was in several respects, a trust for the wife and children of John H. Coster, as well as for his benefit.

1. As a trust to sell the real estate, it was directly and specifically for the children and their issue, after the death of John H. Coster.

2. For the accumulations of the rents and income during the life of John H. Coster, there was an express trust for the benefit of his children.

3. The trust to apply the income to the use of John H. Coster, for life, *for the support of himself and his family*, was for the benefit of his wife and children, as well as for his own use and benefit. (*Woods v. Woods*, 1 M. & C. 401; *Jubber v. Jubber*, 9 Simons, 503.)

By the will therefore, the estate was principally, if not wholly, in the trustee; John H. Coster had a life interest in its income; his wife and children were entitled to share in the income, to such extent as the trustee might justly deem reasonable for their support; and after his death, his children and their issue were to receive the capital of the property, both real and personal, and the intermediate accumulations.

I now come to the codicil. No one can read it in connection with the twelfth article of the will, without perceiving that the testator designed to give to John H. Coster, the entire interest in the 11-106 of his estate. On the construction given to that article, by the counsel for the executors, John H. Coster had a *life interest* under the will, in all the property in question. By the codicil the testator professes to give to him an *absolute interest*, as distinguished from a life estate; the devise is to John, and his heirs and assigns. "For that purpose," as the codicil expresses it, the testator revokes the trust previously given for John's wife and children. For what purpose, unless it was to give the whole estate to the husband and father?

Such being the plain intention, has the testator failed to effect it, for want of sufficient language to describe the object of his gift?

His words are, "*all the property, estate or interests*, whether real or personal," which by the will he has devised or bequeathed in trust for the wife and children of his son John, and their children, or heirs, or either of them; he by the codicil, devises and bequeaths to John, absolutely in fee, and for his own proper estate; for that purpose revoking the trust.

I have shown that the whole 11-106 parts, were devised

and bequeathed in trust. So far the description of the object is perfect.

Next, there was no part of those 11-106ths, but what was, or might be, in trust for the wife and children of John H. Coster, or some one of them. The application of the income was to be made for their benefit. The sale of the real estate, the investment of its proceeds, the re-investment of the personalty, the conversion of personal into real estate, and the accumulations from both sources; were all legitimate objects of the trust, which directly affected the children, and all those who were ultimately to possess and own the property.

It does not detract from the force of the description, that John H. Coster also had an interest, and a large interest, in the trust created by the twelfth article. It was none the less a trust for his wife and children, because he participated with them in its benefits. And the 11-106 were given in trust for them, as well as for him.

The codicil gives to John H. Coster absolutely, *all the property and estate*, which he had before given in trust for his wife and children, or either of them. He had by his will, given 11-106ths of his entire estate, in trust for him and them. There was no other trust in his will for their benefit, in any form. It follows that the same 11-106ths, is "*all the property*," which he describes in the codicil. There is no other property which answers the description.

But it is urged that the codicil only professes to give the same *interests*, which by the will were bestowed upon the wife and children.

It is true, the word "interests" is used, but it is used disjunctively. The codicil cannot be restricted to the mere *interests* bestowed on the wife and children, when by its express words, it devises and bequeaths *all the property and estate*, out of which those interests are carved and limited.

The revocation of the *whole trust*, corroborates this construction of the previous description of the objects devised by the codicil. If those objects were merely the interests which had been given to the wife and children, under a trust for their benefit in common with that of John H. Coster; the revocation would

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have been restricted to those interests, leaving the trust to stand. But if the purpose were, as the codicil declares, to give to John the absolute estate in the whole property which had been devised and bequeathed in trust; then it was proper and necessary to revoke the entire trust.

My conclusion is clear and unhesitating, that by the will and codicil, John H. Coster takes the absolute legal estate in the 11-106ths of the testator's property, which are described in the twelfth article of the will.

There must be a decree accordingly, with costs to the parties, to be paid out of the estate of the testator.

MCLEAN v. TOWLE and others.

A surety in a debt secured by mortgage on lands of the principal, on paying off the debt, becomes subrogated in equity to the rights of the creditor, and is entitled to foreclose the mortgage in his own name.

So where one owning lands which he had mortgaged, sold them to M. who assumed the mortgage debt, and M. sold them to T. who assumed the mortgage in like manner, and M. was then compelled by the original debtor, for his indemnity, to pay to the creditor the amount of the mortgage; it was *held*, that M. could foreclose the mortgage against P. and the lands mortgaged.

Held, also, that M.'s right to foreclose was perfect without an assignment of the bond and mortgage; and an agreement by M. to forbear collection on receiving such assignment, was without consideration and invalid.

In equity a mortgage is not extinguished by such payment made by a surety.

September 3; November 26, 1845.

THIS was a bill filed by Cornelius McLean, to foreclose a mortgage, executed by Aaron Marsh to Noah T. Pike, on the 18th of January, 1839, to secure \$3000, according to the tenor of a bond given by Pike therewith. On the 30th of April, 1841, Marsh sold and conveyed the equity of redemption in the mortgaged premises subject to the mortgage, to McLean, who by the terms of the deed to him, assumed the payment of the bond and mortgage as a part of the consideration money. On the 12th of August, 1841, McLean sold and conveyed the premises to J.

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Towle, subject to the mortgage, who in like manner assumed the payment of the bond and mortgage. The mortgage having become due, and Towle and McLean neglecting to pay it, Marsh filed his bill against Pike, McLean and Towle, upon which a decree was made on the 21st of December, 1843, directing McLean and Towle to pay to Pike, the amount of the mortgage debt, so as to exonerate Marsh. (See the case reported, 1 Sand. Ch. R. 210.) Marsh issued an execution on the decree, upon which McLean was compelled to pay the debt. Pike then assigned the bond and mortgage to McLean. This was on the 7th of March, 1844, and on the 30th of April following, this suit was commenced by McLean.

The answer of Towle and wife alleged that Pike was induced to assign the bond and mortgage to McLean, instead of cancelling them, by Towle's exertions, and that McLean thereupon agreed not to require payment from Towle, till the 1st of June, 1844. They also insisted, that the mortgage was discharged by McLean's payment to Pike, and ceased to be a lien. Also that the suit and decree in the case of Marsh against Pike, was a bar to this suit.

Testimony was taken on the agreement of McLean to forbear payment.

J. M. Martin, for the complainant.

N. D. Ellingwood, for the defendants Towle and wife.

THE ASSISTANT VICE-CHANCELLOR.—When the mortgage in question was before this court in the suit of *Marsh v. Pike*, (1 Sandford's Ch. R. 210,) I decided that it was competent for Marsh, on paying the amount of the mortgage to Pike, to enforce its lien in his own name, against those who succeeded to him in the title to the equity of redemption. The Chancellor affirmed this doctrine on the appeal from my decree—(10 Paige's R. 595.)

The same principle extended to McLean, and on his paying the amount, he became entitled to the same remedy against Towle for the collection of the debt out of the mortgaged premises.

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His right to this relief was perfect without any assignment of the bond and mortgage. If Pike had refused to deliver to him the securities, as well as to execute an assignment, it might have been necessary for McLean to make Pike a party with Towle, in his suit to enforce the mortgage. This however was an affair with which Towle had no concern, inasmuch as the costs occasioned by it would of course devolve upon Pike.

An assignment from Pike being unnecessary for the protection or security of McLean's rights, there is no valid consideration for the agreement set up in the answer, founded upon Towle's procuring Pike to make such assignment.

It may have been unfair and dishonorable in McLean to violate that agreement; but if it were, it does not furnish a ground for influencing the determination of this court. I must proceed on the legal and equitable rights of the parties, as ascertained by law.

It is said that the decree in *Marsh v. Pike* extinguished the mortgage. This was not its effect, when the money came from the surety, McLean. The decree directed Marsh to be exonerated, by a payment to Pike. If Towle had paid the amount, the mortgage would have been discharged. But on his surety paying it, equity at once subrogated the surety to the rights of the mortgagee, and kept the security on foot for his protection.

Further it is urged that the former decree gave to McLean all the remedy he needed, and if it did not, he should have obtained it by a petition in that suit.

As to this, the decree in Marsh's suit gave only a personal remedy against Mr. Towle. And it does not appear that there were sufficient parties in that suit, to enable the court to decree a foreclosure of the mortgage, either in the first instance or in an application on the foot of the decree.

For aught I can perceive, McLean was compelled to commence a new suit in order to obtain a regular decree for the sale of the mortgaged premises.

He is entitled to such decree for the amount of his debt and costs.

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THOMPSON and WIFE v. THE EXECUTORS OF CARMICHAEL
and others.

The provision in the statute regulating descents, for bringing advancements made by an intestate, into *hotch-pot*, in the division of his real estate, does not apply where there is a will disposing of a part of the decedent's property, either real or personal. It relates to a total intestacy only.

Where a will, disposing of all the decedent's real and personal property, was decreed to be invalid, except as to some specific legacies, and a charge for the support of his widow ; it was *held*, on a partition of the real estate, that an heir who had received an advancement from the decedent, was not bound to bring the same into *hotch-pot*, or account for it in the division of the estate.

The same doctrine has always prevailed in England, under the statute 22 and 23 Charles 2, ch. 10, from which our law was taken.

A testator directed that his wife should receive half-yearly, such sum out of his estate as the trustees and executors of his will, from time to time, should think proper and necessary for her reasonable support :

Held, that her reasonable support was not to be determined by the amount necessary for her bare subsistence ; but regard must also be had to the extent and income of the estate, and the propriety of her living with her children.

Sept. 12 ; December 3, 1845.

ON the first hearing of this cause, the trusts of the will of the testator, Daniel Carmichael, by which all his lands were vested in his executors, were decreed to be void ; and the bequests of his personal property were also held to be invalid, with the exception of some small specific legacies, and a provision for the support of his wife. The bill being framed for a partition of the real estate, the usual interlocutory decree was made, referring it to a master to take proofs and make the proper inquiries, preliminary to a decree for partition.—(See the cause reported in 1 Sand. Ch. R. 387.)

The will contained a provision that in case the wife of the testator should release her right of dower to the trustees, or in case she should not be entitled to dower, then that she should at least half-yearly as long as she should remain a widow, receive such sums of money from out of the real or personal estate as the case might require, as the trustees and executors of the will, from time to time should think proper and necessary for her reasonable support.

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The widow was not entitled to any dower by reason of her alienage. Under this clause in the will, the Master reported that \$350 annually ought to be paid to the widow for her reasonable support. This sum was from \$100 to \$150 more, than according to the testimony, was necessary for her support, if she were to live at board; but it appeared that some of her children were of tender years so as to require her care, and the income of the estate was about \$1450 per annum, which was only a small per centage on the value of the property.

The Master on the reference refused to charge the complainants with a bond of \$1000, alleged to have been given to Mrs. Thompson by the testator, as a portion or advancement. The defendants insisted that she was bound to bring this bond into *hotch-pot*, and they excepted to the Master's report in respect of the bonds, and the amount of the annual allowance to the widow.

Charles O'Connor, for the complainants.

I. The statute being in terms confined to cases of intestacy, and the law of advancements being a mere creation of positive statute, the alleged advancement cannot be charged against the complainant in this case, because not only is there a will naming an executor; but such will makes several valid dispositions of property, and among them a provision for the widow which conveys the present use of the whole personal estate.—(*Snelgrove v. Snelgrove*, 4 Dessaussure, 292; *Newman v. Wilbourne*, 1 Hill So. Ca. Ch. R. 11; *Sinkler's Ex'r v. Sinkler's Legatees*, 2 Dess. 139; 3 Bac. Abr. 76, 77; *Walton v. Walton*, 14 Vesey, 323; and see note to *Ex parte Lawton*, 3 Dess. 202.)

II. An ingenious argument has been constructed upon a change of language in the revised statutes, in reply to which we respectfully make the following suggestions, referring also to *Harris v. Fly*, 7 Paige, 425; *Rhodes v. Rudge*, 1 Simons, 79; *Ramon Assets*, 204; end of 10th provision in decree, in *Kane v. Gott*, 24 Wend. 647.

It would seem from the revisers' note, that they intended to abolish the rule allowing a mere will, without any disposition of property, to prevent the application of the doctrine of advancement.

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It is evident that the legislature did not apprehend the object of the revisers, and did not adopt it. Proceeding to give a construction to the statute, the question will be whether the revisers' equivocal phrase, "deceased persons," or the definite word "intestate," used by the legislature, shall control.

1. We are to construe the statutes most nearly to the common law; and subsequent statutes most nearly to the prior law. For an intent to change the pre-existing law, is not to be inferred from a mere change of phraseology, in a revision of prior statutes. (2 Caines' Cases in Error, 150; 20 John. R. 722.)

2. Now here, though it be apparent that the revisers intended to change the law, and attempted to make that intent apparent to the legislature; yet the legislature, which is the *law-making power*, either did not perceive or intentionally disregarded that design; for the legislature inserted in their addition, the very word "intestate," which was deemed so objectionable by the revisers.

3. In construing the provisions relative to personal estates, one of two things must take place. "Intestate," must be deflected from its proper meaning, and rendered synonymous with "deceased person," or the latter must take its complexion from "intestate." The first course would bend the will of the legislature to the will of the revisers. This would seem to be the reverse of the proper course. And independently of the argument to be derived from the paramount authority of the legislature, the indefinite should yield to the definite. "Deceased person," is open, equivocal and indeterminate; it points to no definite class or kind of decedents. It yields no light as to the intent—whether it was intended to include or exclude any particular class of decedents. "Intestate" is precise and definite, and consequently serves to define the class of decedents intended by the preceding indefinite terms, "deceased persons."

4. Even if the court would allow itself to be controlled by the intent of the revisers, still it does not appear that that intent extended to alter the English rule, in a case where a portion of the estate was disposed of, but only to a mere naked testacy, i. e. a will, and nothing more. In the present case there is a legacy to the widow, with the present use of the whole personal estate; be-

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sides sundry other legacies. To allow of an advancement being charged against the next of kin coming in under a partial intestacy, would be unequal, inequitable, and contrary to the spirit and intent of the statute of advancements. Suppose a man worth \$30,000 and having two sons, gives in his life-time \$10,000 to one of them, and by his will \$10,000 to another. There would then be an intestacy as to \$10,000, the *whole* of which must go to the legatee. This gives him two-thirds of the estate.

5. Again, this part of the R. S. where these dubious words, "deceased persons" occur, are by 2 R. S. 98, sec. 79, rendered wholly inapplicable to this case. And consequently this case is wholly governed by 1 R. S. 754, sec. 23; and in this provision, the "intestate," is the word used throughout, and the decisions cited apply with all their force.

6. It is conceived, however, that the true construction of the provisions, to avoid all conflict and inconsistencies, and make the whole rational; is as above suggested in subd. 2, to wit., that the revisers' intent was disregarded and rejected by the legislature. This doctrine of advancement is a creature of statute, and however equitable in itself, has no foothold in the law, except what it derives from direct enactment. *Ita lex scripta est*, is the only reason that need or can be, for charging an advancement. Where the written statute does not reach, the previous law remains.

III. The *personal* estate must be first applied to the satisfaction of the widow's provision, and exhausted, before a resort can be had for that purpose to the real estate.

: *D. M. Cowdrey*, and *R. Emmet*, for the defendants.

The statute of distribution among next of kin, expressly provides for bringing advancements into hotchpot, in cases where there is a will which does not bequeath the whole estate; as well as where the deceased shall have died intestate. (2 R. S. 97, § 75, 76.)

The revisers in their notes to § 75, (3 R. S. 2d Ed. p. 645,) say that they have substituted the term "deceased," for "intestate" in the old act, (1 R. L. of 1813, p. 317, § 16,) in order to provide

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for the case where there is a will which does not bequeath the estate ; and that they have omitted (in that section) the part respecting advancement, as being more proper for a separate section, (which immediately follows.) In case a person made no disposition of such of his goods as were testable, whether that were only part, or the whole of them, he was, and is said to die intestate. (2 Black. Com. 494.)

The decree in this case has created the very state of things contemplated by § 75, viz., a will, but the surplus after the payment of debts and legacies, not bequeathed.

But it is provided by the 78 section that § 76, and 77 (providing for bringing advancements into hotchpot) shall not apply in any case, where there shall be any real estate of the intestate to descend to his heirs.

Note, this provision was not in the section as originally proposed by the revisers. It was an amendment by the legislature. The reason given by the revisers in their note to § 75, for using the word "deceased," instead of "intestate," either seems to have been disregarded by the legislature in this amendment, or they meant to confine the prohibition as to the application of § 76 and 77, to cases of strict or entire intestacy.

If they intended to embrace every case which could arise under § 75, then inasmuch as Carmichael left real estate to descend to his heirs, § 76 and 77, (stat. distributions,) cannot apply to this case ; and we must look to the provisions about advancements, in that part of the statute which regulates the descent of real property.

1 R. S. 754, § 23, 24, 25, 26, (relating to advancements,) were all amendments to the chapter as proposed by the revisers. (See Revisers Notes, 3 R. S. 2d Ed. 605.)

Section 23d provides, "If any child of an intestate shall have been advanced by him" &c. ; differing from § 76, of the statute of distributions, which says, "If any child of such deceased person, shall have been advanced by the deceased," &c.

It is contended for the complainants ; 1st. That the provisions about advancements in the statute of distribution, (§ 76 and 77,) have no application to this case, because Carmichael left real estate to descend to his heirs. (§ 78.)

2d. That the provisions about advancements in the statute of descents, (§ 23, 24, 25,) do not apply, because this is not a case of intestacy, there being a will and executors.

This is blowing hot and cold both, because to prevent the application of the provisions about advancements in the statute of distributions, Carmichael must be assumed to have died intestate (§ 78;) and to prevent the application of those provisions in the statute of descents, he must be considered as not having died intestate.

But assuming the point to be whether the provisions in relation to advancements in the statute of descents apply, we contend that Carmichael is to be considered an intestate, within the operation of that statute.

1st. In a case of partial intestacy, must advancements be brought into hotchpot?

2d. Was this a case of partial intestacy, or of actual or total or entire intestacy, *pro tanto*, of the estate?

In *Walton v. Walton*, (14 Vesey, 323,) Sir William Grant, Master of the Rolls says, "the provision in the statute of distributions, applies only to the case of actual intestacy, and where there is an executor and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them; therefore the child advanced by her father in his life, could not be called on to bring her share into hotchpot." The statute of distributions means, not a person making no will, but a person dying intestate as to the subject to be distributed by the statute. (*Twisden v. Twisden*, E. 1804, 9 Vesey, 425.)

The principle assumed in this opinion of Sir W. Grant, and upon which it turns, is that the appointment of an executor, constitutes a complete will. This may be true as respects personal property, because the executor becomes entitled to all personal property, either in trust for others, or beneficially for himself.

But it has no application to a will of real estate. Suppose a man makes a will simply appointing an executor, but making no disposition of his property, and dies leaving nothing but real estate, and no debts to pay, is that a complete will? The executor takes nothing, has no function to perform.

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4 Kent's Com. p. 419, note a. remarks upon the word "deceased" in the statute of distribution, and "intestate" in the statute of descents and doubts the application of *Walton v. Walton*, in this state. And see the remarks of Chancellor Walworth in *Hawley v. James*, (5 Paige's, Ch. Rep. 450, 451,) on the word "deceased" in the statute of distribution, and "intestate" in the stat. of descents. He refers to *Vance v. Huling*, (2 Yerger's Rep. 135, Tennessee, 1833. See reversal 16 Wend. page 61.)

This case in Yerger was a case of descent of real estate acquired subsequent to a will, there being an after born child. Decree of hotchpot in his favor as to other real estate devised by the will. And see 3 Yerger, 45.

The whole doctrine of collation, is founded principally on the equality which the law requires in the distribution of estates among heirs. (4 Kent. Com. 419, note c.) We contend that Carmichael was an intestate, within the meaning of the term as used in the statute of descents, (1 R. S. 750 to 755,) although he left a will and appointed executors; because he died without devising his real estate. The word intestate, throughout this chapter, has reference to the words of the 1st section. "The real estate of every person who shall die without devising the same," that is without devising his real estate. A will of personal property with executors appointed, would not prevent his being an intestate under this chapter. Neither would an invalid will of real estate which was not a devise. A father advanced some of his children with portions in his lifetime, and then made his will, thereby reciting that he had advanced B. & C. but omitted D., whom he had also advanced, and left to him a sum certain, bequeathing the residue among all. Held that the money which D. had received, should go in satisfaction of the legacy left to him. (*Upton v. Prince*, Ca. temp. Talbot, 76.) Another case of a will and executors, and yet advancement, was decreed, although not appearing in the will. (*Redington v. Redington*, E. 1794, 3 Ridgw. P. C. 106.) The whole case is stated at length in 2 Bridgman's Digested Index, 613, pl. 40.

The counsel also referred to 4 Dessauss. 292; Toller on Executors, 380; 3 P. Will. 317, note o; 1 Ves. 16.

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THE ASSISTANT VICE-CHANCELLOR.—The first question arises upon the advancement to the complainants by the testator. And independent of the point, whether the bond was intended as a gift, or as a portion to Mrs. Thompson; it is claimed that the statute relative to advancements, is not applicable to this case.

The result of the former decree is, that Daniel Carmichael died without making any valid disposition of his real estate, or of the mass of his personal property. He left a will, which is valid so far as it bequeaths a small specific legacy to each of his two sons, and gives to his wife similar legacies, together with a sum sufficient for her support, charged upon his whole property.

The statute law exclusively, regulates the subject of advancement. This case does not fall within the provisions contained in the article of the revised statutes, relative to making distribution to the next of kin, because there is real estate which descended to Carmichael's heirs. (2 R. S. 97, 98, § 76 to 78.)

In the chapter "Of Title to Real Property by Descent," (1 R. S. 754, § 23 to 26,) it is provided, that if any child of *an intestate* shall have been advanced by him, &c., the portion shall be estimated in the division and distribution of the real and personal estate of the intestate.

It is contended on the one side, that these provisions apply where there is an intestacy *pro tanto*; and on the other side, that they are not applicable at all where there is a will.

In the first place it is to be observed, that the words used in the revised statutes, are the same as those in the parallel statute published in the revised laws of 1813; and that statute had been continued without change in this respect, from its first enactment in this state on the 20th of February, 1787. (1 Greenleaf's Laws, 363, § 3; 1 Rev. Laws, 313, § 16.) Our first act was taken from the statute 22 and 23 Car. 2, ch. 10, made perpetual by the act 1 Jac. 2, ch. 17, and its language on this subject, is the same.

We may therefore look for our guidance to the construction put upon the act of the 22 and 23 Charles.

It appears to have been settled in England, soon after the passage of the law, that the child who had been advanced, was not required to bring his advancement into hotch-pot, except in the case of a total intestacy. *Vachell v. Jeffereys*, (Prec. in Ch.

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169,) and *Cowper v. Scott*, (3 P. Will. 124,) appear to be direct authorities on the point; and they are confirmed by Sir William Grant's opinion in *Walton v. Walton*, (14 Ves. 324.) This is also laid down as good law in 3 Bac. Abr., Exec. and Admin. K. (And see *Hawley v. James*, 5 Paige, 450, 451—per Chancellor; and *Wheeler v. Shear*, Mosely's R. 301, 304.)

The same thing was decided under the statute of distributions in South Carolina, in a series of cases extending from 1802 till 1833. *Sinkler v. Legatees of Sinkler*, (2 De Sauss. Eq. R. 139,) which was a case of partial intestacy as to personal estate; *Snelgrove v. Snelgrove*, (4 *ibid.* 274, 291,) where there was a total intestacy as to the real estate, through a defect in the execution of the will, one of the witnesses being a devisee, but the will was valid as to the personalty; *Newman v. Wilbourne*, (1 Hill's Chy. R. 10;) and *McDougald v. King*, (1 Bailey's Eq. R. 154.)

I was referred to two decisions in Tennessee as being adverse to these. In one, devisees under a will were required to bring their devises into hotch-pot, in order to obtain a provision for a posthumous child, who was otherwise unprovided for.

In the other case, on a division of after acquired lands which did not pass by the will, the children of a second marriage, who by the will took all the lands the testator had at its date, were compelled to bring those lands into hotch-pot, in order to share in the former.

Under our statute I do not think that a provision by will, can be deemed an advancement.

On the statute itself, (1 R. S. 754,) a total intestacy appears to be contemplated. It is true, that in some of the previous sections of the same chapter, the word *intestate* is used as correlative to the words in the first section, *person who shall die without devising real estate*. But this is evidently to be restricted to its connection with the subject matter, that is to lands undevised. A person who had made a will, and disposed of all his personal property, would nevertheless be an *intestate* under those previous sections, as to the portion of his lands undevised, however insignificant. The twenty-third section commences a new subject. It is not "*the* intestate," or "*such* intestate;" referring to what goes before; but the words are, "*an* intestate," and the

provisions relate to personal estate which has not before been mentioned in the chapter, as well as to real estate. It is used as a general term, without qualification ; and as such, its meaning is well known and clearly defined. Both in its legal and popular sense, it means a person who dies without making a will.

The same language "an intestate," without addition or qualification, is used in the revised statutes, in the article relative to granting letters of administration. In short, a man who dies leaving a will, is not *an intestate*.

This case must be decided upon general principles, and not upon its peculiar features. It may be very plain to me, that this testator if he were now to make his will anew, would compel his eldest daughter to account for the bond of \$1000, towards her distributive share, or exclude her entirely. But the same construction, which in this case would probably approximate towards his intention ; in another case might utterly frustrate the intention of the testator. Where one has advanced a part of his children, and then by will devises property to the residue, leaving other property undisposed of ; it is a legal and reasonable presumption, that he intended the latter to go to both classes of his children equally, if any of it remained at his death. As to one class he has been his own executor. As to the other, he has by his will placed them upon an equal footing with the first class.

Now, if the defendant's construction of the statute is to prevail, the clear intent in the case put, will be utterly destroyed. The second class of children cannot be required to bring their legacies and devised estates into hotch-pot, for those are in no sense an advancement. And they can compel the first class to bring in and divide all the property they received from their father in his life time, or else exclude them from the whole estate which was not disposed of by the will.

The same consequence will ensue as to after acquired lands, where the will does not dispose of them ; and this is a case of frequent occurrence. So of any undisposed surplus. Again, take this case. There is a specific legacy to two of the children. They are trifling, it is true, but if they had been a valuable library and a service of plate, the principle would be the same. How can the courts arrive at the equality which is the foundation of

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the statute as to advancements, where the testator has given to one and withheld from the others? They cannot bring legacies into the fund for an equal distribution; and in every case of partial intestacy, the courts would be quite as likely to overthrow the intent of the testator by interfering in the mode which is sought here, as they would to carry it into effect.

The safer course it appears to me, is to follow the plain terms of the statute, and the English decisions; making no constructive intestacies, but leaving it to the legislature by more full enactments, to remedy the injustice, if any be found to exist.

In regard to the annual allowance made to the widow for her reasonable support; I am satisfied with the decision of the master. What is *reasonable* for her, is not to be determined by the amount necessary for her bare subsistence. Reference is to be had also to the extent and income of the estate. And I think it is proper that she should be enabled to live with and take care of her small children.

Under all the circumstances, I think the allowance is *reasonable*. (a)

The objections to the master's report are therefore overruled. And in all other respects the decree will conform to the complainant's points.

T. S. GIBBES and WIFE v. JENKINS and others.

A continuance of church leases, is expected as a matter of course, without any covenant of renewal.

The good will for such a continuance, arising from the ownership of the old lease, constitutes a recognized and valuable interest, although the corporation granting such lease is not bound to continue it, or grant a renewal.

The new lease, in such cases, is held a continuance of the original term, for the protection of the rights of parties who had liens upon or interests in such term.

One purchasing a leasehold, which is subject to a mortgage, and contains no covenant of renewal, cannot escape the lien of the mortgage, by suffering the lease to expire, and afterwards obtaining a new lease for the premises.

(a) See *Tolley v. Greene*, 2 Sand. Ch. R. 91.

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Such new lease is in equity subject to the mortgage, precisely as the former one was when its term expired.

October 18 ; December 6th, 1845.

THE bill in this cause, filed June 28th, 1844, stated that on the 19th day of April, 1815, The Rectors, Church-wardens and Vestry-men of Trinity Church, in the city of New York, executed a lease of two lots of ground owned by them, situated on Murray street, to Jane Adams, for the term of nineteen years from the 25th day of March, 1815, reserving an annual rent of \$303 30 for the first five years of the term, and \$25 for the remaining fourteen years. That on the 15th of May, 1815, Adams assigned the lease to Thomas Gibson and Morgan Davis.

On the 15th of May, 1816, the rents were paid in such manner that from thenceforth the annual rent was to be only \$25.

On the 6th of July, 1824, Gibson and Davis executed a mortgage of the term of years and their right in the premises to the Phoenix Fire Insurance Company, to secure the payment of \$10,000.

On the 6th of June, 1825, they gave a further mortgage thereon to the same company for \$3000.

The Insurance Company subsequently proceeded to foreclose those mortgages, and obtained the usual decree for a foreclosure and sale, on the 16th day of November, 1826. Gibson, Davis and others, were defendants in the foreclosure suit.

On the 9th of February, 1827, the Phoenix Fire Insurance Company, in consideration of \$13,000, assigned the bonds and mortgages and the decree of foreclosure, to Samuel Ward, Jr. and William G. Bucknor, trustees for the above complainant, Susan Annette Gibbes.

On the 16th of September, 1830, Joseph Delacroix, who had previously bought Davis's equity of redemption in the mortgaged premises, conveyed the same to Thomas E. Tucker, in trust for the benefit of Sophia, the daughter of Delacroix and the wife of Davis, during her life, and on her death to be divided among her children.

Davis died after the execution of that deed, leaving his widow, Sophia, and eight children him surviving, one of whom was the wife of Tucker. His widow, Sophia, married John S. Jenkins,

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and Tucker constituted Jenkins his agent to manage the trust estate.

On the 22d of April, 1834, prior to the death of Davis, the Rector &c. of Trinity Church, executed to Gibson and to Tucker as trustee, jointly, two leases, each for one of the lots, demised in the first lease, for terms of twenty-one years each from May 4, 1834 ; with covenants for two renewals of like terms, or that the lessors should pay for the buildings on the premises at the end of the first term. The annual rent for one of the lots was \$450, and of the other \$360, for the first term. The description of the premises in each lease concluded thus ; " as the said lot of land is now held and possessed by the said parties of the second part, under and by virtue of a certain indenture of lease heretofore made by the parties of the first part to one Jane Adams, and bearing date the 19th day of April in the year 1815."

At the same date, Gibson and Tucker, the latter as trustee &c. executed their bond to Ward and Bucknor, trustees of Mrs. Gibbes, for \$13,000 with interest, and their mortgage of the two new leases and the terms therein granted, as security for the bond.

Davis and wife executed an instrument under seal indorsed on the mortgage, and bearing the same date, reciting that those leases were renewals of the previous demise to Jane Adams, and declaring that the bond and mortgage last described, were executed to continue the lien of the former mortgages on the renewed leases, and Mrs. Davis thereby consented to Tucker's execution thereof as her trustee.

On the 17th of December, 1834, Ward and Bucknor pursuant to an order of the court discharging them from their trust, assigned the bond and mortgage &c. to the complainant, Thomas S. Gibbes, appointed trustee in their stead.

The bill claimed that the whole principal was due, with interest from August 7, 1843, and also \$810, for ground rent to Trinity Church, and it prayed a foreclosure of the mortgage of 1834, and a sale of the premises.

The defendants Jenkins and wife, and one of the children of the latter, answered the bill, admitting all the facts charged, except as next stated.

They annexed to their answer a copy of the trust deed under

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which Tucker held for Mrs. Jenkins, and insisted that the same did not authorize Tucker, with or without her consent, to execute the mortgage given in 1834. That the bond executed by Tucker was without consideration and void. That the lease to Jane Adams contained no covenant of renewal, and was absolutely determined on the 25th of March, 1834. That the mortgages to the Phoenix Insurance Company thereupon became inoperative, and ceased to be liens on the premises; and Tucker's liability to pay the debts thereby secured, also ceased. That the new leases were totally distinct from the one to Adams, and they conveyed to Gibson and Tucker a new and unincumbered estate.

Gibson put in an answer alleging usury in the advance by Mrs. Gibbes's trustees in 1827; but it is unnecessary to state the allegation.

Anthony Dey and James Lorimer Graham, two counsellors long and intimately conversant with real estate securities and investigating titles, were examined as witnesses by the complainants, to prove the usage of Trinity Church, to renew leases although there were no covenants; and the value attached to the expectation or good will of such renewals.

D. D. Lord and *D. Lord*, for the complainants.

G. G. Waters and *W. S. Johnson*, for the defendants Jenkins and others.

D. Evans, for Gibson.

THE ASSISTANT VICE-CHANCELLOR.—In my view of this case, it is not necessary to examine the questions upon the execution of the mortgage by the trustees under the marriage settlement.

The complainants are clearly entitled to a decree, irrespective of that mortgage.

There was no merger of the original mortgages, in the decree for their foreclosure which the Phoenix Fire Insurance Company obtained in 1826. The lien was not diminished or impaired, but it was made more effective.

In April, 1834, the interest in the lease was vested in Gibson, and in Tucker the trustee of Mrs. Davis, subject to the lien of Mrs. Gibbes's trustees by virtue of the original mortgages and the decree. So far as Mrs. Davis and her children had any rights in the property, they were subject and subordinate to those mortgages. I say in *April*, 1834, for although the term in the old lease expired on the 25th of March, the recital in the new leases is evidence that at their date, the parties were still holding under the old demise.

The new leases bear date April 22, 1834, and are granted to the two persons who had the legal title at the termination of the former demise. An enhanced rent is reserved, but it is not pretended that there was any consideration paid. They were church leases, a continuance of which is expected as a matter of course, without any covenant of renewal. The church was not bound to renew or continue the old lease, but the good will for such continuance arising from its ownership, constituted a recognized and valuable interest.

The new leases, by reference to the holding under the expired term, show that the good will was operative in this instance. It continued the rights of the mortgagees, on precisely the same principle that it sustains the rights of Mrs. Davis and her children. If Gibson and Tucker obtained the leases as strangers would have taken them, independent of any prior or subsisting demise, the children of Mrs. Davis certainly have no interest in the premises. The description of Tucker as trustee for Mrs. D., in the leases, might possibly save her interest in the case supposed. But Gibson and Tucker could not, if they had been so disposed, obtain new leases so as to exclude any of the parties having interests in the old lease.

The law has long been settled in this court, that the new leases, though not a renewal, are a continuance of the original term, for the purpose of protecting the rights of such parties, both legal and equitable.

The case of *Phyfe v. Wardell*, (5 Paige, 263,) fully sustains the principle; and the leading cases from 1670 down, are there reviewed by the Chancellor. See also *Holridge v. Gillespie*, (2 J. C. R. 30,) where Chancellor Kent applied the same principle

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to a mortgagee in possession. And for more recent applications of it to analogous cases, I refer to *Tanner v. Elworthy*, 4 Beavan, 487; *Waters v. Bailey*, 2 Younge and Coll. Ch. R. 219; and *Dickinson v. Codwise*, 1 Sand. Ch. R. 214, 225.

The result is, that these tenements under the new leases, continued in equity, subject to the two original mortgages, precisely as they were, under the old lease; and the complainants are entitled to a decree by way of supplement to the former decree, for a foreclosure and sale.

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AN original bill may be filed to set aside a decree obtained by fraud.

Where a mortgagee, having two mortgages for the same debt, one on the principal debtor's lands, and one on lands of a surety whose infant heir has succeeded thereto, after the debt was satisfied by a conveyance of the former, filed a bill against the infant to foreclose the mortgage on the lands of the latter, in which he claimed the mortgage money to be due, and the infant answered by his guardian ad litem, no defence was set up, the usual decree for a foreclosure and sale was made, and the infant's lands were sold under the decree, the mortgagee becoming the purchaser of a portion of the same; it was *held* that the decree was obtained by fraud, and it was set aside.

Also held, that the mortgagee must release to the infant the lands bought in by him, and account for the rents and profits of the same, and for the sums paid by the purchasers at the sale, who were strangers to the fraud.

A husband and wife joined in executing two mortgages, accompanying his two bonds; all being given for the same debt. This was in part a pre-existing debt of the husband's, and in part money advanced to him at the time. One mortgage was on his own lands, the other was on the wife's inheritance. *Held*, 1. That the husband's lands were the primary fund for the payment of the mortgages, and the wife's became the secondary or auxiliary fund for that purpose. She became the surety for her husband in respect of the latter. 2. That the suretyship is made out in such a case, by showing that it was the husband's debt, or that he received the money advanced. If the money were used for the benefit of the wife or her property, or any circumstances exist which will defeat her claim to be regarded as a surety; it must be proved by the party alleging such fact.

A second mortgagee, holding also the mortgage liability of a surety, bought of the mortgagor, the premises mortgaged, for a price exceeding the first lien and his own combined, and received an absolute deed, subject to the first lien. The excess beyond the first lien, was not applied to the debt secured by the second mortgage; but shortly after the sale, the purchaser agreed in writing with the

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principal to apply the net profits beyond the price paid, to that mortgage debt. *Held*, as between him and the surety, 1. That his mortgage was merged by receiving the conveyance in fee, and that his debt was extinguished. 2. That if it were otherwise, he must account to the surety for the price paid beyond the amount of the first lien; and this being more than the debt, the surety was discharged. 3. That as between the principal debtor and the mortgagee, the latter could still enforce the debt.

Although in the absence of direct proof of intention, equity will intend a merger or the contrary, from the interest of the party taking the deed being in one direction or the other; it cannot prevent a merger contrary to his interest, where he clearly intended to do the acts which legally effect a merger, although he may have done them under an erroneous view of their legal consequences. Where two persons are joint mortgagees, but are each owners in severalty of a part of the mortgage debt; one of them may so act as to merge his own mortgage interest, without affecting that of the other.

Where such a joint mortgagee pays to his co-mortgagee a portion of the debt of the latter, with the express purpose of discharging his lien; the former cannot enforce the mortgage for such payment, or be subrogated in respect thereof.

A surety who gives a separate mortgage, on conveying a part of his lands in satisfaction of the debt, is entitled to be subrogated to the mortgagee's claim on the mortgage of the principal debtor.

May 13, 14, 15; December 22, 1845.

THE bill in this cause, filed January 16th, 1844, by Charles W. Loomer, an infant aged sixteen years, who prosecuted by William T. Whittemore, his next friend, set forth the following facts:

On the 1st day of May, 1837, Otis Loomer and Jane T. his wife, the father and mother of the complainant, executed to Paul Spofford, Thomas Tileston, and Benjamin F. Wheelwright, the defendant, as collateral security for Otis Loomer's bond of the same date for \$25,000, payable in one year with interest, a mortgage on six stores and lots in the city of New York, known as numbers 187 and 189 Pearl street, and 1, 3, 5 and 7 Cedar street. On the same day, Loomer and his wife, to secure Loomer's bond, conditioned to pay \$40,000 in one year with interest, executed to the same three persons, a mortgage on property therein described, as "all the undivided tenth part of all the lands, tenements, hereditaments, and real estate of which Samuel Whittemore died seised or possessed of unto; the said tenth part being the said Jane T. Loomer's share of the estate of the said Samuel Whittemore, as one of his heirs at law."

Both of these mortgages were recorded on the 3d day of May, 1837. When the last described mortgage was executed, the defendant knew that the lands thereby mortgaged, were the individual property of Mrs. Loomer. The two bonds and mortgages were executed at the same time, and were given to the mortgagees jointly, so that neither might have priority; but they were intended to secure two wholly distinct demands, the one to Spofford and Tileston jointly, in which Wheelwright had no interest, the other to Wheelwright solely and exclusively. The sums named in the bonds and mortgages were nominal, both set of securities being in fact given to secure the same sums then owing by Otis Loomer to Wheelwright and to Spofford and Tileston, respectively, and a loan of \$3000 then made to him, one-half by S. and T., and the other half by Wheelwright; and on a verbal agreement, that the mortgages should be security for future advances to be made by them to Loomer. The bill charges that this agreement was not binding on the complainant. When the bonds and mortgages were given, the amount due from Loomer to Spofford and Tileston, including the \$1500 then advanced, did not exceed \$12,000; and the amount due to Wheelwright, including the \$1500 advanced, was \$8217 41; all of which, except the \$1500, was for cash and notes advanced to Loomer by Wheelwright previous to the execution of the mortgages, and W. made no advances upon the mortgages after the time of their execution.

In August, 1835, a bill was filed in this court before the Chancellor, by two of the heirs of Samuel Whittemore, against his widow, Jane H. Whittemore, Otis Loomer, and Jane T., his wife, and the other heirs of Samuel Whittemore, for the partition of the real estate of the latter. On the 5th of November, 1837, an interlocutory decree was made in that suit, settling the rights and interests of the parties, and appointing commissioners to make the partition, with the usual directions in such cases. The dower of Mrs. Whittemore was to be set off in each of the heir's allotments, in equal proportions.

On the 16th day of December, 1837, after the commissioners had made the allotments, but before they reported the same, Mrs. Loomer died, leaving the complainant her only child and heir.

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A bill of revivor and supplement was filed, and on the 30th of January, 1838, a decretal order was made, reviving the partition suit against the complainant, and declaring his rights and interests in the lands, &c. The commissioners allotted to the complainant for his tenth part of Samuel Whittemore's lands and tenements, one lot in Barrow street, and one lot in Sixth Avenue, in which Mrs. Whittemore was to have a life estate as her dower; together with four lots on Fourth; and on Bleeker, Christopher, Factory, Twenty-fifth and Twenty-Sixth streets, one lot each; all of the last mentioned lots, being subject to Loomer's life estate as tenant by the curtesy.

Some time in 1838, Spofford, Tileston and Wheelwright, released from the effect of their mortgage, two of the lots on Fourth street to a purchaser thereof, upon receiving \$4,600, of which Wheelwright retained one-half, and S. and T. the residue.

In February, 1839, Loomer as the special guardian of the complainant, pursuant to an order of this court, conveyed to Spofford and Tileston, another of the Fourth street lots, and the lot on Bleeker street, in full satisfaction and discharge of their interest in the two bonds and mortgages; and Wheelwright at the same time released those two lots from his lien by virtue of the mortgage thereon.

On the 25th of November, 1841, Wheelwright filed his bill in this court, for the foreclosure of that mortgage, against all the lots set off to the complainant in the partition, except those which had been released. The defendants in the bill, were the now complainant, Otis Loomer, Spofford and Tileston, and Frederic De Peyster, administrator, &c., of John Clendinning. Wheelwright thereby claimed that there was due to him on the mortgage, the sum of \$7010 64, with interest from November 1st, 1841; although nothing whatever was then due to him thereon, and on the contrary, he had been overpaid a large sum.

A guardian *ad litem* in that suit was appointed for the now complainant, who put in the usual general answer, and on the 10th day of February, 1842, a decree was made directing a foreclosure and a sale of all the lands of Mrs. Loomer remaining subject to the mortgage, except one lot mortgaged to Mr. De Peyster. On the reference, the master reported due to Wheelwright, \$7209

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31, which sum, with interest and costs, was to be paid to him out of the proceeds of the sale. Mr. De Peyster had put in an answer, claiming a prior lien by way of mortgage on the lot excepted in the decree, and it was provided that he and Wheelwright should be at liberty to litigate as to their priorities in respect of that lot, notwithstanding the decree.

On the 28th of March, 1841, the lots embraced in the decree were sold by a master. Wheelwright became the purchaser of the lot on Barrow street, for \$1140, and the lot on Christopher street for \$525. The lots on Factory, Twenty-fifth and Twenty-sixth streets, were sold to strangers for the aggregate sum of \$1220. The net amount of the sales, after discharging prior liens was \$2784 10; out of which were deducted the master's costs, with Wheelwright's and the guardian's being together \$303 27; the master paid Wheelwright \$815 83; and he receipted \$1665, more for his own purchases. The decree was enrolled April 25, 1842; the lots sold were conveyed to the respective purchasers by the master; and his report of sale was duly confirmed in July, 1842. The deficiency on Otis Loomer's bond as reported by the master, was \$4729 16.

On the 18th of November, 1842, Mr. De Peyster as administrator of Clendinning, filed his bill in this court in the nature of a cross bill against Wheelwright, setting up a mortgage executed to him by the complainant's special guardian pursuant to an order of the court, on the Sixth Avenue lot, subsequent in date to the mortgage on Mrs. Loomer's lands before set forth; and charging that both of the Loomer mortgages were given to secure the same debt, that the one on the Pearl and Cedar street lots was still outstanding; and praying that Wheelwright might be compelled to exhaust those lots before proceeding against the Sixth Avenue lot, which was De Peyster's only security.

Wheelwright answered De Peyster's bill, on his oath in January, 1843. By that answer, and by the records in the office of the register of deeds, it appeared that Loomer on the 1st day of February, 1840, in consideration of \$48,350, as expressed in the deed, conveyed lots 187 and 189 Pearl street, to Wheelwright in fee; and in consideration of \$16,000, as expressed in the deed, conveyed to W. in fee, lot No. 1 Cedar street. By the

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deeds, these three lots were sold subject to a mortgage for \$60,000, executed by Loomer to John Jacob Astor. That on the 6th of February, 1840, Loomer by another deed, in consideration of \$52,000, as therein expressed, conveyed in fee to Wheelwright, lots No. 3, 5 and 7 Cedar street; each lot being so conveyed, subject to a mortgage thereon executed by Loomer to the estate of Laurent Salles for \$16,000, amounting in all to \$48,000. That these several deeds were recorded February 7th, 1840.

The present complainant in his bill, further stated that the lands conveyed by those deeds were the individual property of Otis Loomer, when the mortgage herein first mentioned was given thereon by him, and Wheelwright then knew it. The deeds were absolute, and were as such accepted and received by Wheelwright; and by reason of those conveyances, the mortgage on the Pearl and Cedar street lots merged in the estate in fee, and was no longer a valid and subsisting lien on those lots; and that Wheelwright expressly admits the same in and by his answer to the bill filed by De Peyster. That the whole consideration mentioned in the deeds of those lots, and which in the same answer Wheelwright admits he agreed to pay therefor to Loomer, was \$116,350. That the whole amount of the prior mortgages subject to which the same were conveyed, was \$108,000; leaving a balance of \$8350, which Wheelwright was bound to credit to the now complainant, in full satisfaction of the mortgage given on his mother's inheritance; but no part of that sum was ever credited on either of the two mortgages executed by Loomer and wife to Spofford, Tileston and Wheelwright.

At the time the deeds of the Pearl and Cedar street lots were executed, the amount due to Wheelwright who was then alone interested in those two mortgages, did not exceed \$6500.

On the 16th of January, 1840, the three mortgagees released to a purchaser, the only Fourth street lot not herein otherwise accounted for, on which Wheelwright received \$500, no part of which sum was credited by him.

The bill charged that the obtaining the before mentioned decree for foreclosure by Wheelwright in his suit on the mortgage upon Mrs. Loomer's lands, was fraudulent, and tended to and did deprive the complainant of his estate in those lands. It further

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stated that on receiving the master's deed, Wheelwright entered and continued in possession of the Barrow and Christopher street lots. The bill prayed that the foreclosure decree might be set aside as fraudulent and void as between the complainant and Wheelwright; that W. might be decreed to convey to the former, the two lots last mentioned, and to account for the rents and profits; also to pay the amount received by the master on the sales to strangers under the decree, with interest, and the amount which he had been overpaid when he filed his foreclosure bill.

The answer of Wheelwright admitted all the statements in the bill, except as is otherwise noted. He alleged that Loomer had an estate as tenant by the curtesy in his wife's lands, which he mortgaged to Spofford, Tileston and Wheelwright; and after the partition, the lien continued on that interest. He stated that when Spofford and Tileston's debt secured in the two mortgages, was paid off in February, 1839, the lots conveyed to them were taken at an appraised value which fell \$675, short of the amount due to them; and he paid that sum to them, which he claimed continued a lien in his favor on the mortgage of Mrs. Loomer's land. He also claimed it by way of subrogation to Spofford and Tileston's lien, or as a further advance. The sum which he alleged to be due in his foreclosure bill and for which he obtained the report of the master, included this \$675, as being advanced on the 28th of October, 1841. Owing to a difficulty in the title, the deed to Spofford and Tileston was not accepted by them till that day, and then he released the lots conveyed to them. He insisted that the whole sum claimed on his foreclosure, was then actually due to him. That the lot on Christopher street bought by him at the master's sale, was sold subject to a prior lien thereon for \$1337; and the lot on Barrow street was subject to an annual payment of \$400, to Mrs. Whittmore, as arranged in the partition, for her dower interest in the lands descended to Mrs. Loomer. The lot on Factory street sold by the master, was subject to a prior lien for \$1500.

He denied that the conveyances of the Pearl and Cedar street lots, were executed and accepted with the design or intent to merge Loomer's mortgage to him, S. and T. thereon, so as to cancel the debt so far as the complainant is concerned, and render the mort-

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gage on Mrs. Loomer's lands no longer a lien on the same ; or under such circumstances as would operate to effect such merger, or destroy the lien of the latter.

That although the consideration expressed in those deeds was \$116,350, he never admitted that he agreed to pay that amount, and it was expressly provided in the agreement made at the time, that he should not assume, or be liable for the mortgages to Astor, and the estate of Salles. At that time, and until October 28, 1841, Spofford and Tileston's interest continued in Loomer's mortgages.

He alleged that the \$500 received on releasing the Fourth street lot, was held by him subject to an undetermined condition with the purchaser, and that in no event could the now complainant become entitled to its benefit, because the latter's share in the partition was liable to such purchaser for the value of the lot so released, for equality of partition.

He denied that his foreclosure decree was obtained by fraud, or tended to or did injure the complainant, or deprive him of any rights. He averred that he had a full and perfect right to foreclose the mortgage and obtain such decree as he did ; the decree was justly obtained, and it should be held as binding and conclusive upon the complainant. As to the possession of the two lots purchased by him under the foreclosure, he never entered on the Barrow street lot, the rents being taken for Mrs. Whittemore's dower right. He had occupied the Christopher street lot from January 1st, 1842. He alleged that the Pearl and Cedar street lots were conveyed to him at Loomer's request, so that he might manage them for his better security, Loomer being insolvent and about to leave the country, and if the title remained in him it would be affected by judgments, &c. That Wheelwright did not pay any money to Loomer personally on receiving the deeds, considering the lots to be then incumbered for more than they were worth on a forced sale at that time. The consideration in the deeds was the supposed amount of all the incumbrances thereon. A conditional engagement was given in pursuance of the agreement between Wheelwright and Loomer, in these words :

"NEW YORK, 6th February, 1840.—Whereas I have this day

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purchased of Otis Loomer two stores in Pearl street, and four in Cedar street, as per deeds, for the sum of one hundred and sixteen thousand, three hundred and fifty dollars; and as a further consideration, I have agreed, and do hereby agree, to apply all profits gained by me in said purchase, over and above interest, taxes, assessments, repairs and improvements on said estate, to the extinction of a claim I now hold against him of about six thousand dollars, which is secured to me by a mortgage, dated May 1st, 1837, made by O. Loomer and wife, to P. Spofford and Thomas Tileston, and myself, on one undivided tenth part of the real estate of Samuel Whittemore, deceased. But it is understood and agreed, that I relinquish no right to collect the said claim of six thousand dollars from the property so mortgaged, in the same manner as I could have done had this agreement not have been made, as it is not expected by me that there will ever be any profits on this purchase, over seven per cent. interest, and other necessary charges, as mentioned above. And it is also agreed that I do not assume the payment of any of said Loomer's bonds, but the holders are to look to the estate, and said Loomer only, for payment, without any recourse to me.

B. F. WHEELWRIGHT."

The mortgages given by Loomer and wife on the first of May, 1837, formed no part of the consideration of the deeds of the Pearl and Cedar street lots, and no part or portion of the mortgages was deducted from or allowed on the purchase money. A memorandum showing a true account of the purchase, the moneys paid, and the deductions for liens, was made at the time, of which the following is a copy :

"Memorandum of settlement with Otis Loomer, for purchase of stores in Cedar and Pearl streets, in the city of New York.

Store 187 Pearl street, purchased for	\$24,350 00
" 189 " " "	24,000 00
" 1 Cedar street, " "	16,000 00
	<hr/>
	\$64,350 00
Deduct Astor mortgage on the whole,	60,000 00
	<hr/>
	\$4,350 00

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Amount brought over,		\$4,350 00
Store, 3 Cedar street, purchased for	\$17,000 00	
Deduct Salles mortgage	16,000 00	1,000 00
Store, 5 Cedar street, purchased for	\$17,500 00	
Deduct Salles mortgage	16,000 00	1,500 00
Store, 7 Cedar street, purchased for	\$17,500 00	
Deduct Salles mortgage	16,000 00	1,500 00
Total,		\$8,350 00
Deduct Whittemore mortgage on all the above, for	\$6,000 00	
Deduct taxes then due,	514 45	
“ my note, payable in six months,	1,850 00	8,364 45
Balance due me which was paid by O. Loomer,		\$14 45”

The note of \$1850 was indorsed by Loomer and then cashed, and of the proceeds, \$1680 were paid for interest then due on the prior mortgages, and only about \$5 was left for Loomer. That \$514 45 was paid by Wheelwright for taxes then due on the stores and lots. That these facts substantially, were set forth in his answer to De Peyster's bill, except that he omitted to state the application of the note for \$1850. That he has kept an accurate account of his receipts and expenses, in respect of those stores and lots, with a view to the application of the surplus profits pursuant to his agreement.

On the 1st of September, 1841, he lent to Loomer \$600, to enable him to purchase a farm at Westfield, New Jersey, on which to reside with his son, as security for which, L. surrendered the above agreement. This sum has never been repaid. On the 15th of December, 1842, for a final settlement of the agreement, and in full thereof, W. paid to L., in addition to the \$600 lent, ten shares of rail road stock of the par value of \$1000, and then worth \$860. Loomer was then insolvent, and unable to provide for his own and the complainant's support; the latter living with and depending upon his father; and the

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allowance was believed to be a full equivalent for the surplus profits reserved in the agreement before set forth. The deed for the farm was taken in Wheelwright's name to secure it for the complainant, and W. recently conveyed it to Loomer in trust for the complainant, and L. has since conveyed it to the next friend of the complainant, on the same trust. In February, 1843, W. let Loomer have \$250 for his own and his son's support, on a pledge of the rail road stock ; and recently, W. paid \$762 82 on the same stock to the complainant's next friend, and took from him a bond conditioned for its application for the benefit of the complainant.

The answer claimed that these several sums should be allowed to Wheelwright, in any account decreed to be made between him and the complainant. It insisted that the statement of a merger, in his answer to De Peyster's bill, was a legal inference, by which he is not bound as to the complainant, against whom neither of the Loomer mortgages, ought under the circumstances, to be deemed cancelled. That since buying the Pearl and Cedar street lots, he has ascertained other liens thereon to more than \$6800, including \$2730 arrears of interest on the Astor and Salles mortgages ; and Loomer had collected \$1250 of the rents in advance. Since then, No. 7 Cedar street has been sold for \$15,000, on a foreclosure of the Salles mortgage thereon.

The answer further insisted that if Wheelwright were to account, he should be allowed the \$1393 65, paid to Astor on the Christopher street lot, and the \$675, paid to Spofford and Tileston, as well as the \$1612, paid for the Jersey farm.

The testimony on the part of the defendant, proved the payment of the \$675, to Spofford and Tileston on the 28th of October, 1841, and that such payment was a condition upon which they discharged their part of the mortgages. Also the payment to Astor on the prior mortgage, subject to which the Christopher street lot was allotted in the partition. Also the application of Wheelwright's note of \$1850, and the payment of \$514 45, for taxes, as stated in the answer ; that the \$500 received by W. on the Fourth street lot, was due to and held for the purchaser, on the ground of a claim by him against the complainant for equality of partition, pursuant to some re-appraisement made between

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the Whittemore heirs subsequent to the decree in partition. Also the purchase of the New Jersey farm for the complainant and his father, and their residence on it three or four years, and its conveyance to the guardian *ad litem*, in trust, but subject to the event of this suit. W. T. Whittemore testified that Wheelwright purchased for \$1000, his mortgage for \$6000, on the Pearl and Cedar street lots; and it was doubtful in February, 1840, whether those lots on a foreclosure, would have brought more than the first mortgages thereon.

Otis Loomer, examined for the defendant, testified that the deeds of those lots were intended to be absolute, and the consideration was as therein expressed. There was no promise or condition, but he trusted to Mr. Wheelwright's honor. A few days after the conveyances were made, Mr. W. sent to him the agreement dated February 6, 1840. He, Loomer, expected that the property would pay all he owed, and that W. would pay the mortgages given to Spofford, Tileston and Wheelwright, out of any thing over and above the first liens, interest, taxes, &c.

Murray Hoffman, for the complainant, presented and argued the following points:

1st. By the operation of the several mortgages executed by Otis Loomer, one upon the wife's inherited estate, and the other upon the individual property of Loomer, the relation of principal and surety was established. And the property of the husband, contained in one of the mortgages, became the primary fund for the payment of the husband's debt, and the property of the wife comprised in the other mortgage, became the secondary or auxiliary fund. (13 Conn. R. 376; Pitman on Princ. and Surety, in 8 Law Library, N. S. 119, 160, 166.)

2d. The case is thus brought within the decision and principle of *Gahn v. Neimcewicz*, and similar authorities, (3 Paige, 614; 11 Wend. 312.) Also (Beatty's R. 386; *Graves v. Graves*, 1 Wash. C. C. R. 1; *Eddy v. Traver*, 6 Paige, 521.)

3d. The effect of the deeds of February, 1840, even coupled with the agreement delivered some days after the delivery of such deed, was to charge the defendant Wheelwright, with the sum of \$8350, the agreed value of the equity of redemption, in the hus-

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band's mortgaged property, and to fully and finally discharge the premises inherited by the wife and comprised in the collateral mortgage in which she joined. (*James v. Morey*, 2 Cowen, 248; *Denniston v. Burnham*, 5 J. C. R. 35; *Sealey v. Lake*, 1 Beav. 146; *Hood v. Phillips*, 3 Beavan, 514; *Astley v. Mills*, 1 Simons, 298.)

4th. When Wheelwright filed his bill to foreclose the mortgage upon the wife's property, he had been actually overpaid, by the sum of at least \$1334.

5th. The relief sought as to the Christopher street lot, on which an apportionment of a mortgage executed by Samuel Whittemore, the ancestor was made to the amount of \$1337, is a re-conveyance to the infant of the same, and upon the payment, or security to him of such sum of \$1337, or such sum as may have been paid upon the same.

6th. The defendant assumed the payment of the arrears of interest on the mortgages, as well as the principal, or has been fully repaid by the rents of the premises.

7th. The amount if any due on the Boardman mortgage, forms no demand in favor of defendant.

In answer to the defendant's points, as to the decree in his foreclosure suit being a bar, and not to be assailed by an original bill; Mr Hoffman cited *Richmond v. Tailleur*, 1 P. Will. 737; *Monell v. Lawrence*, (12 Johns.) 525; *Bradish v. Gee*, (Ambler, 229;) *Stiles v. Martin*, (1 Ch. Ca. 150;) (Mitford's Pl. 93, 94, and cases cited; Story's Eq. Pl. 340, § 427; 1 Hoff. Ch. Pr. 233;) *Savage v. Carroll*, (1 Ball & Beatty's R. 548; 1 Hoff. Ch. R. 178.)

A. W. Bradford, and John Anthon, for the defendant.

I. The complainant having duly appeared to the bill filed by defendant, for foreclosure, in 1841, and having then full power to raise as a defence, his present assumption of a merger in law, and having failed to do so, and the decree being enrolled; it is properly interposed as a bar by the answer, and is a flat bar to complainant's bill in the absence of fraud. (Beames Pleas, 211, 217; Mitford, 84, 92, 236; Cooper, 89; 3 J. C. R. 367; 3 Atkyns, 626;

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2 P. Will. 819 ; 3 Ves. 317 ; 1 Ves. & B. 233 ; 1 Sch. & Lef. 317, 387.)

II. There is no proper special averment in the bill of complaint of any fraudulent conduct on the part of the complainant in obtaining that decree, nor is there, if averred, any proof of fraud. The matters of error in law alleged to have occurred, are the subject of a bill of review only.

III. The proceedings in the case of *De Peyster v. Wheelwright*, and the decree in that suit, are *res inter alios acta*, and the complainant in this suit cannot avail himself of them, nor is the defendant in any wise affected by them, the decree having been appealed from. The facts relied upon may be used on a bill of review and not otherwise.

IV. A decree so appealed from, could not be pleaded in bar, pending the appeal, by the party himself, in whose favor it was rendered ; *a fortiori* it cannot be used as a weapon of offence by a stranger.

V. Admissions made in that suit, are necessarily too, confined to the suit and the parties ; these parties have nothing to do with them under any form of bill.

VI. The present bill therefore, must invoke other grounds of support, and there are none.

First. The supposed merger affords no ground of support.

1. Because it does not exist in point of fact, or law, the instruments of conveyance, being clearly proved to have been mortgages, by reason of the defeasance.

2. The hypothecation of the instrument of defeasance to secure the advance, made to Loomer afterwards, did not change the character of the original transaction.

3. If a merger, the complainant was bound to have availed himself of it in proper season, before decree, the facts at that time existing and the recording of the deeds being notice to him.

4. There is no averment, or proof of any difficulty in discovering the fact, if due diligence had been used ; even a bill of review would therefore be untenable.

5. There is no averment or proof of any fraudulent concealment which can affect the decree.

Second. The admission of the pleader, in drawing the answer, in

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a case between other parties and in setting forth a matter of mere law, affords no support to this bill, which prays that a decree may be vacated on the ground of fraud, and which uses such mistakes in opposition to all sound rules of evidence, as proof of fraud.

It is presumed that these positions are sufficient to show that the present bill of complaint is entirely untenable, and must be dismissed with costs. But if the details are deemed by the court, still matters open to investigation here, then we insist on the following points in further special detail.

A. A mere inference of law where all the facts have been stated, should not operate to the prejudice of a party in a suit; much less should an error of law in one suit, prejudice him in another, between different parties. The points of law therefore, raised in the case wherein Depeyster was complainant, and Wheelwright defendant, should not be allowed to estop the defendant in this case from claiming his rights.

B. The acceptance of the conveyance of the Pearl and Cedar street lots, did not operate to merge the mortgage thereon in the estate in fee, or to cancel the mortgage.

1. Because Spofford and Tileston were still interested in the mortgage.

2. Because the mortgages of Wm. T. Whittemore, and of Wm. Boardman were intermediate.

3. Because a merger will not be presumed in the absence of any expressed intention, and against the interest of the party. (2 Fonbl. Eq. 163; Theobald Princ. and Surety, 95, 96; *James v. Morey*, 2 Cowen, 247, 303, 307, 309; 7 Paige, 510; 1 Hill, 170; 1 Paige, 193; 1 Madd. Pr. 540; *Dunham v. Dey*, 2 J. C. R. 189.)

C. Although the defendant took absolute deeds of the Pearl and Cedar street lots, he did so on a trust intended for the benefit of the infant's estate, which was an equitable trust, and should be sustained. (2 J. C. R. 189; *Van Buren v. Olmsted*, 1 Paige, 9; *Brown v. Dean*, 3 Wend. 208.)

D. If the infant is to be considered as a surety for the debt of his father, there has been no such dealing with the principal as will absolve the surety.

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1. Because no extension of time was given.
2. Because the acceptance of the deeds enured to the benefit of the infant.

3. Because the very gist of the arrangement indicated that the mortgages were considered as still in existence ; and that provision was to be made, by the arrangement, for the liquidation of the lien on the infant's estate. (3 Paige, 614 ; 8 *ibid.* 277 ; 4 Wend. 381 ; Theob. on Pr. and Surety, 95, 96, and 84, 86 ; 2 Sim. & St. 457.)

E. The fact that the title was not searched, and that all the payments made at the time of taking the deeds, were made on prior liens and merely to protect the property, shows that no purchase intended to operate as a merger, was contemplated.

F. The evidence of Otis Loomer shows that the trust has continued to this time ; the surrender of the instrument of trust which occurred after the decree and sale in foreclosure, even if valid cannot be permitted to have a retro-active effect.

G. The mortgages were made at open amounts. They have been reduced by parol testimony ; and it is further competent to show by parol, that they were intended to secure future advances.

H. The payment by the defendant to Spofford and Tileston, of \$675, the balance of their claim on October 28, 1841, shows that the parties believed the mortgages were not cancelled ; and also constitutes such a future advance as would alone justify the proceedings in foreclosure. (2 Cowen, 292 ; *United States v. Hooe*, 3 Cranch.)

I. All the accompanying circumstances show that the real character of the transaction of 6th February, 1840, was fiduciary, and that the parties intended to provide additional collateral security for the payment of the mortgage on the infant's estate.

J. The release to Charles R. Whittemore and the receipt from him of \$500, in trust, was made in consequence of his holding the lot released by a deed from the special guardian of the complainant. If the mortgage is declared to have been cancelled, the defendant is bound to return the amount.

K. The decree in partition which gave Charles W. Loomer the remainder in fee after the life estate of the widow of Samuel

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Whittemore, deceased, in the lots on Barrow (and Christopher) street, was erroneous, depriving Otis Loomer of his life estate in said property. The complainant has no present interest in any of the estate mortgaged by his mother, and cannot have, until the death of his father. The mortgage must under any circumstances, be held as a good lien on Otis Loomer's estate, in the property as tenant by the curtesy.

L. If the above views be correct, the decree and sale on foreclosure were valid, and the defendant is only bound to account for the profits of the trust estate. This he has always been ready to do, and the bill having been filed with another object and without the defendants being called on to account, should be dismissed.

M. The decree on foreclosure under which the property was sold, should not be disturbed. It is not alleged that since the decree any new facts have been discovered. All the circumstances connected with the transaction were as fully known to all the parties at the time of filing the bill in foreclosure, and at the time of the decree, as they are now.

THE ASSISTANT VICE-CHANCELLOR.—The bill seeks to set aside as fraudulent, a decree of this court obtained by Mr. Wheelwright against the infant who is now complainant, in February, 1842; by which the lands remaining subject to the mortgage in question, were ordered to be sold, and the equity of redemption of the infant was foreclosed.

That an original bill will lie for this purpose, is too well settled to need a reference to authority.

But it is objected by the defendant, that this bill, if it were all true, does not present a case of fraud in obtaining the decree; and that the matters averred as furnishing proof of fraud, are merely errors of law, for which relief can be obtained by a bill of review only.

If this objection be well taken, it is fatal to the suit. I will therefore examine it in the first instance. So far as it bears upon the point, the case made by the bill is this:

Otis Loomer mortgaged his own lands to Mr. Wheelwright, for his own debt. For a further security, he procured his wife

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to join him in mortgaging, for the same debt, her lands which she had by inheritance. The present complainant is the sole heir of Mrs. Loomer. On the 1st of February, 1840, Otis Loomer sold and conveyed to Mr. Wheelwright, the equity of redemption in his own lands mortgaged, for a price exceeding the balance due to Mr. W., for which both mortgages stood as a security. By this means the principal debtor paid the debt with the fund which was primarily liable; and thereby the lands descended to Charles W. Loomer, which were in the place of a surety for that debt, were discharged. That the conveyance to Mr. W. operated as an absolute merger of his mortgage, and in this mode also effected a discharge of the surety. Nevertheless, Mr. W., in November, 1841, filed a bill in this court to foreclose his mortgage on young Loomer's lands, claiming that more than \$7000 was due to him, and taking no notice of the other mortgage, or of his dealings with Otis Loomer's lands in February, 1840. That his suit went through the usual course of proceeding in foreclosures, where infants are parties defendant. No special defence was made by the guardian *ad litem*, and a decree was pronounced on the usual formal proofs, on the assumption still maintained by Mr. Wheelwright, that the whole amount claimed by him was due, and a lien on the infant's lands. The guardian *ad litem*, stated nothing of the defence of payment or merger. The decree was enrolled, and all the lots subject to the mortgage, (save one on which Mr. De Peyster held a junior mortgage,) were sold by a master. Mr. W. became the purchaser of two of the lots, and he owns them still. Three other lots were sold to strangers, and the net proceeds were paid to Wheelwright. The facts in regard to the sale made to him by Otis Loomer in February, 1840, came out in January, 1843, in the subsequent contest between W. and De Peyster, relative to the Sixth Avenue lot. The bill charges that the obtaining the decree of foreclosure by Wheelwright, against the infant Loomer, was fraudulent, and deprived the infant of his estate in the lands therein mentioned.

The question is, whether this statement overcomes the bar made by the decree itself, and authorizes this court to look behind it and set it aside.

I do not find that any of the authorities referred to, come up to

the point. The treatises say, "it is said that where an improper decree has been made against an infant without actual fraud, it ought to be impeached by original bill." But I find no adjudication that it may be impeached on the sole ground of its impropriety.

A decree for foreclosure *and sale*, in this state, forms an exception to the general rule that where the infant's inheritance is to be affected by a decree, it must give him a day in court to show cause against its provisions after he becomes of full age. (*Mills v. Dennis*, 3 J. C. R. 368; *Harris v. Youman*, 1 Hoff. Ch. R. 178; *Wright v. Miller*, 1 Sand. Ch. R. 103, 120.)

The decree for a sale, binds the infant, as it does all other parties defendant. Therefore the reported cases, in which infants have been permitted to put in a new answer, and to make a defence, on attaining their majority, do not aid us in this respect.

The omission to give the infant a day to show cause, &c., where by the practice it should be given in a decree, is ground of error on which he may impeach it; but this is distinct from fraud.

Mr. Daniell, in his excellent work on the practice, says that an infant defendant is as much bound by a decree in equity, as a person of full age. And he will not be permitted to dispute an absolute decree made against him, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion or error. (1 Daniell's Ch. Pr. 221, 222.)

I think this case must be governed by the rule as thus laid down. Not that the evidence to support the charge of fraud in obtaining a decree, must be precisely the same in kind or degree, in the instance of an infant defendant; for each case, whether of an infant or an adult, will turn upon its peculiar circumstances; but the decree must be impeached on the same general principles.

I may state, once for all, that in what I shall now say of the transaction before me, whether as it is stated in the bill, or as it appears by the evidence, I do not use the term *fraud* as imputing any intentional wrong or deceit to Mr. Wheelwright. The law in many instances deduces a fraud, from transactions in which the parties had no dishonest purpose; and the fraud al-

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leged here, may well be assigned to that class of constructive frauds.

Without canvassing the debateable ground of fraudulent concealments and suppressions of material facts, I will at once declare my conclusion on the case as made by this bill.

Mr. Wheelwright knew perfectly well, or which is in law equivalent, he was bound to know, that his mortgage was no longer a lien upon the lands of this infant. He might reasonably suppose, as the result proved, that the infant and any guardian *ad litem*, who might be appointed to appear for him in a suit, would remain ignorant that the mortgage was satisfied. It must be assumed that his bill was filed on this hypothesis, because it cannot be presumed that he filed it with the expectation of having it dismissed upon a defence of payment being set up and established. He filed his bill of foreclosure, alleging that there was more than \$7000 remaining due to him on his mortgage, when in truth there was nothing due to him. He carried his case through the court, on this false claim, using its forms of proceeding and its officers to establish against an infant, incapable of protecting himself, a state of facts which would divest the infant of his property, and which he knew was wholly unfounded. He withheld in his bill all information in regard to his dealings with the principal debtor and the primary fund, and set forth nothing which would lead the guardian *ad litem*, on whom the court relied for the protection of the infant, to inquire into those dealings, or to suppose that there was such a principal debtor or primary fund. He has thus obtained an enrolled decree against this infant, and unjustly possessed himself of the infant's estate. The question of notice of these facts to the party, in time to make his defence in the former suit, does not arise where such party is an infant.

In the view which I think a court of equity ought to entertain of such a proceeding, this decree was obtained by fraud. I lay great stress upon the fact of the infancy of young Loomer, in weighing these circumstances, because it must be regarded as one of the controlling inducements for filing a bill upon a satisfied mortgage. The case as made by the bill, is between the original parties. No rights of purchasers are called in question ;

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and without laying down any general rule for like cases, I feel bound to say that this decree was obtained under such circumstances, that it ought not to be permitted to stand.

So far I have gone upon the allegations made in the bill, without regard to their truth or falsity. I will next look into the case as it is proved.

The complainant's first position is, that on the execution of the mortgages in 1837, Otis Loomer's property mortgaged, became the primary fund for the payment of the debt, and his wife's inheritance became the secondary or auxiliary fund, for that purpose.

I entertain no doubt of the correctness of this point, and must hold that Mrs. Loomer in respect of her property mortgaged, became the surety for her husband, and that the creditor knew that she was such surety.

It was urged against this conclusion, that the inference from the facts proved is, that the wife intended to make a gift to her husband, or the money was applied for the benefit of her estate.

I cannot assent to this inference. The proof shows that the debt was the husband's, and nearly all of it was due from him to the mortgagees, previous to the execution of the mortgages. He mortgaged his own property in one mortgage, and his wife joined him in another, which conveyed her property. Mr. Wheelwright knew that the debt was the husband's, that the first mortgage was on his property and the other on his wife's estate.

I see no reason why a different rule should be applied to the wife's case, from that which is applied in other instances of principal and surety. If I mortgage my farm to secure my friend's bond debt, and the creditor knows it is my farm, I become a surety for my friend, and the creditor is bound to respect that relationship. The law indulges him in no conjecture that I intend to make a gift to my friend, or that the debt was incurred in some way for the benefit of my property.

Why should such a conjecture or presumption be applied to a wife, in order to disparage her claim as a surety? If there should be any different rule, it ought rather to provide an inference in her favor, than to strain a point against her.

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There can be no legal presumption that it is her debt, or was applied for her benefit. She cannot contract a debt; and the presumption on the face of the securities, is therefore directly the reverse as to its being her obligation. And the fact that it is the husband's debt, certainly precludes any presumption that it was incurred for the benefit of the wife's estate. The sensible rule, in my view is, that the suretyship is made out by facts like those shown here; and if in truth the money went to improve the wife's freehold, or any other circumstance exist, which will defeat her claim to be regarded as a surety, it must be proved by the party alleging such circumstance.

Aside from what I conceive to be the true rule of law, the facts in this case do not bring it within Mr. Justice Nelson's observations in *Gahn v. Niemcewicz*, (11 Wend. 312, 323.) The defendant sets up nothing of the kind in his answer, there is no proof of any necessity for borrowing to support the wife or to pay assessments, and the giving of two mortgages and the pre-existence of nearly the whole debt, clearly distinguished this suit from the one upon which Judge Nelson was commenting. The point before me was not decided in *Gahn v. Niemcewicz*.

Upon the death of Mrs. Loomer, her son succeeded to her rights and became the surety of his father in respect of the property mortgaged by her. The estate of Loomer as tenant by the curtesy, was a primary fund for the payment of the debt. But he had no estate by the curtesy in the lots which in the partition were allotted for the share of Mrs. Loomer, subject to her mother's dower right.

I now come to the conveyance by Otis Loomer, of the Pearl and Cedar street property, in February, 1840. The complainant claims that it must be regarded as a merger of the principal and primary security, or as a payment; and in either view, it extinguishes the mortgage on his property.

In his answer to the cross bill filed by De Peyster, Wheelwright avows, that the mortgage on the Pearl and Cedar street lots was merged by the conveyance to him of the equity of redemption. His counsel objects to the proceedings in De Peyster's suit, that they cannot be used by one not a party to that suit, to affect the rights of Mr. Wheelwright in another controversy.

This is no doubt true in a qualified sense, but the statements of W. in his answer in that suit, may be used as evidence of facts alleged by him ; and it is in that view sufficient for the complainant's argument in this suit.

Then as to the alleged merger. The deeds were absolute and unqualified, from the mortgagor to the mortgagee. Every indentment upon the deeds is against any idea of keeping the principal mortgage to Wheelwright on foot. All the lands in that mortgage are conveyed in fee simple. The expression in the deeds that they are conveyed subject to the Astor and Salles mortgages, excludes the existence of a design that they were to be subject to any other. In equity, merger depends very much upon intention. Where there is no direct proof of the intention, it may be derived from various circumstances, and one of those is the interest of the party to merge his security, or to keep it alive. But that is only one circumstance, and it may be repelled by others. The party may intend to merge, upon a mistaken view of his interest. He may judge erroneously when he knows all the facts ; and he may err exceedingly in regard to the law as applicable to what he is doing. But I am not aware of any principle upon which he can be saved from the consequences of a merger, where his intent is clear, although by a mistake of the law, he supposes he will obtain advantages, which the law correctly applied, entirely cuts off.

I have no doubt but that this is precisely such a case ; and that Mr. Wheelwright, although he intended to merge and put an end to the mortgage on the lots in Pearl and Cedar streets ; equally intended to enforce the mortgage debt upon the lands embraced in the other mortgage, and supposed that the law would bear him out in that proceeding.

The instrument upon which he now relies to rebut the merger, leaves no room for doubt, that both he and Loomer then intended to extinguish the mortgage on the lots conveyed. It contemplates no further recourse to it, or any event upon which it may be brought to bear. It declares an absolute purchase at \$116,350, and provides for applying any surplus beyond that, gained by W. in the purchase, to Loomer's debt, which as I before remarked, W. intended to hold against the other lands.

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The allegation in his answer to the bill of De Peyster, is legitimate evidence of his intention to merge the mortgage, although not conclusive upon him in this suit as matter of law.

The instrument which Mr. Wheelwright executed to Loomer, cannot overcome the effect of the conveyances. It was not designed to make them a new mortgage. That would have been a very idle proceeding. I speak of it as if it had been cotemporary with the conveyances. But it was not executed until after the deeds were delivered, and the character of the transaction in respect of the rights of the surety, irrevocably fixed.

The existence of the alleged subsequent liens, does not impair the evidence of intention. For the principal lien, that to W. T. Whittemore, Mr. W. provided out of the purchase money, and the others, if as it is said, they were unknown to him, could not have influenced his objects or designs in the purchase.

It also objected to the merger, that the interest of Spofford and Tileston in the mortgage, was still outstanding, and prevented any merger of the legal and equitable estates. There are two answers to this objection. First, it is shown that the arrangement by which Spofford and Tileston were fully paid, was made in 1839, and was merely awaiting the order of this court for its consummation. So that Mr. W. acted, as he well might, upon the assumption that their interest had ceased, and when the conveyance was finally made to them, its equitable effect was the same as if it had been made when agreed upon in 1839. And second, the interest of S. and T. was wholly distinct from that of Mr. W.; as distinct as if it had been in a separate mortgage. Therefore Mr. W. might so act, as to merge the mortgage as it respected his own interest, without any reference to that of the other mortgagees; and when the latter were at length paid, the security would then be finally extinguished as to all the mortgagees.

My conclusion therefore is, that by accepting the conveyance in fee of the principal fund mortgaged to him, Mr. W. discharged the lands of the surety from his mortgage debt.

There is another view of this transaction which is equally fatal to Mr. W.'s claim against the estate of the infant. He purchased the equity of redemption of the principal debtor, and thereby

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precluded himself from enforcing the mortgage against the primary fund. The least that can result to him is, that he must account as between himself and the surety, for the value of the equity of redemption, and he has fixed that value by the price which he paid for it. I know it was urged that this price was merely nominal, and the lands were not worth the prior incumbrances. But the deeds, and the memorandum of the application of the purchase money which Mr. W. made at the time, show beyond peradventure, that the price agreed upon was \$8350, over and above the mortgages to Astor, and the executors of Salles; and that this surplus was actually appropriated and paid as between the immediate parties. Such also is the positive declaration of the agreement which Mr. W. gave to Loomer after the sale; and the profits which he thereby proposed to apply to the debt of Loomer, were to be computed on the cost of \$116,350 paid for the Pearl and Cedar street lots.

From this price, \$8350, exclusive of the large mortgages, Mr. W. is entitled to deduct the taxes then in arrear. He is not to deduct the arrears of interest on those mortgages; for the deeds are subject to the amount due on the mortgages, both principal and interest; and the memorandum before mentioned shows that this was the intention.

After deducting the taxes, \$514 45, there remains \$7835 55, which Mr. W. must account for before calling on the surety; and this is confessedly more than was then due to him on the mortgage in question.

It follows that this mortgage was extinguished, so far as Mr. Wheelwright's interest was concerned, in February, 1840, as a lien upon the lands of the infant. It is however claimed in his behalf, that he has a lien by virtue of the mortgage, for the \$675 which he advanced to Spofford and Tileston on their finally releasing their portion of the mortgage; on the ground that it was originally given to secure future advances. The complainant's counsel contends that it never was good for future advances, because it does not in terms provide for them.

I will not enter into that discussion, but will assume that the mortgage was valid for that purpose. It was not valid to Mr.

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W. for that or any other purpose, against this infant, after February, 1840. It was merged, extinguished, gone.

It was not insisted that the advance was any more a lien in favor of Mr. W., because it was made to his co-mortgagees. Nevertheless, I was at first inclined to think that Mr. W. might avail himself of it, not as an advance on his own mortgage, but by way of subrogation to the lien of Spofford and Tileston. But upon consideration, I cannot give to it that advantage. It was paid to S. and T., distinctly and avowedly for the purpose of discharging their lien; and there was no mistake or misapprehension as to a single fact by any of the parties. The only error was one of law, which was Mr. W.'s idea that his own lien was still in full force. I must therefore give to the transaction the direction that the parties then gave to it, and deem Spofford and Tileston's mortgage interest fully discharged. (See *Banta v. Garmo*, 1 Sand. Ch. R. 383.) There is no mode by which the payment of the \$675 can be continued as a lien against the complainant's lands.

The complainant has therefore established the case made by his bill, and the decree which the defendant obtained in his foreclosure suit, must be set aside so far as it respects his rights and claims under the same.

There are a few other matters which require attention before disposing of the subject.

One of these is the claim made by the complainant for \$500, paid to Mr. Wheelwright by Charles R. Whittemore. This affair is left in great obscurity by the testimony. So far as I can discover, the money was paid to Mr. Wheelwright, not because the infant was entitled to receive it from C. R. W., but because C. R. W. could not otherwise obtain a release from the mortgage in question. If there had been no mortgage, no money would have been paid by C. R. W.; and as between him and the infant the latter was bound to pay the mortgage, so as to entitle C. R. W. to a return of the money. It appears to be a matter between C. R. W. and Mr. Wheelwright, in which the infant, in this suit at least, has no concern. How his title in the lot came to be conveyed to C. R. W. is not shown, and I can find no judgment upon that transaction.

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The defendant insists that Otis Loomer had an estate by the curtesy in all these lands, upon which the mortgage continued operative, and the foreclosure and sale are valid to that extent.

I have already observed that Loomer had no estate in the lots which were assigned to Mrs. Jane Whittemore for her dower. In the other lots which fell to Charles W. Loomer in the Whittemore partition, Otis Loomer had a life estate. Upon this life interest, Mr. Wheelwright's mortgage continued to be a lien. There was no merger as to O. Loomer, because he agreed expressly, by accepting the writing dated February 6th, 1840, that the mortgage on these lands should remain in full force. As to him and his estate, it therefore continued valid for the whole amount due to Mr. W. in February, 1840, less that part of the \$8350 on the sale of the Pearl and Cedar street lots which was saved from the estimated amount of W. T. Whittemore's mortgage. And the subsequent payment of \$675 to Spofford and Tileston, ought to be compensated to Mr. W. by Loomer in the adjustment of the application of the purchase money of the lots in Pearl and Cedar streets.

But another equity of the infant intervenes, which renders this right of Mr. W. against Loomer, practically of little or no value to the former. As these securities stood in 1839, when Spofford and Tileston agreed to receive the conveyance of two of the infant's lots, and discharge their lien under the mortgages, the infant had a right to be subrogated to their lien against his father's lands, to the extent of the value of his interest in those two lots, on their being applied to the payment of his father's debt. (*Eddy v. Traver*, 6 Paige, 521.) This right of subrogation extended to his father's life estate as tenant by the curtesy, as well as to his lots on Pearl and Cedar streets. As between Mr. W. and the infant, the mortgage debt of W. was paid off by his purchase in February, 1840; so that he has no right to interpose his debt to the prejudice of the infant's subrogation for the amount which his property has paid to Spofford and Tileston. For this amount therefore, the infant's equity under the mortgage in question, must be preferred to Mr. Wheelwright's claim as between himself and Otis Loomer on the tenancy by the curtesy.

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In this connection however, I think that it is but just for the infant to account for the \$675, paid by Mr. W. to Spofford and Tileston. Unless that payment had been made, S. and T. would still have held their lien for that sum, with priority over the infant's claim to be subrogated. And seeking equity, he must here do equity in regard to this direct relief which Mr. W.'s payment has afforded to his property.

The payment made by Mr. W. to Mr. Astor in discharge of the original mortgage on the Christopher street lot, is a proper charge by him against the infant in the account to be taken.

The other transactions between Mr. W. and Otis Loomer, ostensibly for the benefit of the infant, and I doubt not, really intended for his benefit, are not subjects to be brought into this suit.

No one was legally authorized to act in them for the infant, and he is not liable in respect of them. They are entirely foreign to the matters upon which the infant's rights in this controversy depend ; and other persons must be made parties to any proceeding by Mr. W. founded upon those transactions.

There must be a decree accordingly. Mr. W. must release and convey to the infant the two lots which he purchased at the Master's sale, and must account for the sums paid by those who bought the other lots sold by the Master under Mr. W.'s decree, with interest thereon. If he so elect, he may have an account taken of the value of Otis Loomer's life estate in those lots in which he was tenant by the curtesy, estimating those sold to strangers at the prices then obtained, and the Christopher street lot at its present value ; and against this valuation of Loomer's estate in the lands, there must be placed the amount which the infant's property has paid to Spofford and Tileston, with interest thereon. The \$675, paid by W. to the latter, is a proper item on his side of this account.

If the value of Loomer's life estate, and the \$675, exceed the amount for which the infant is entitled to be subrogated under Spofford and Tileston, the excess is to be credited to Mr. W. in the general accounting.

He is also to account for the rents and profits of the two lots

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which he bought at the master's sale. And he is to be credited in the account for the sum paid to Mr. Astor, with interest on the same.

If the balance be found in favor of Mr. Wheelwright, he will have a lien for the amount on the two lots which he is to convey to the infant. If it be against him, he must pay it into court for the infant's benefit. And he must bear the costs of this suit.

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W. being indebted to E. and desiring forbearance, procured N. to advance his securities to E. for the amount, and W. gave to N. his bond for the same sum and transferred divers effects to N. The bond recited the transfer of the latter, and stated it as being to secure the bond. With the bond, the transfer and the effects W. delivered to N. a letter, giving a history of the transaction, and stating that the effects were transferred to be held in trust for the payment of N.'s securities to E. The letter was accepted without objection, and it conformed to the verbal arrangement.

Held, 1. That the transfer by W. to N., the bond, and W.'s letter, were to be construed together, as if their terms had been brought into one instrument, executed by the parties.

2. That the letter does not conflict with or detract from the bond, or diminish its force ; although both derogate from the absolute terms of the transfer executed to N.
3. That the letter is admissible to prove a consideration for W.'s transfer, other than that mentioned in the bond.
4. That it was competent for W. to file a bill against N. and E., to secure from loss, the property assigned to N., and for an account.

The case of *Leavitt v. Tylee*, 1 Sand. Ch. R. 207, confirmed.

September 4, 5, 6 ; December 30, 1845.

THE bill was filed on the 9th day of September, 1842, by Gabriel Shaw, Fletcher Wilson and Melvil Wilson, merchants of the city of London, trading while in business, under the firm of Thomas Wilson & Co., against David Leavitt, Receiver of The North American Trust and Banking Company, Thomas G. Talmage, Richard M. Blatchford, and The Governor and Company of the Bank of England.

The case established by the pleadings and evidence was as follows :

The complainants in June, 1837, suspended payment, being

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largely indebted to various persons and bodies corporate. They negotiated with their creditors, and a payment of thirty-three and one-third per cent. was finally agreed upon, which was to be made on the 28th of September, 1838. On that day they were indebted to the Bank of England, for such per centage, £63,544 5s. 3d., for money lent to them on bills of exchange and promissory notes then in the possession of the bank. An extension of time was arranged between Wilson & Co. and the bank, on condition that the future payment should be secured by the certificates of deposit of The North American Trust and Banking Company, a banking association in the city of New York. The latter entered into the arrangement, and it was carried into effect. The complainants conveyed and transferred to the North American Trust and Banking Company, property in the United States, amounting according to its scheduled value to \$439,295 51, and actually worth as then estimated, more than three hundred thousand dollars; which was to be a security to the Banking Company for the complainant's bond hereafter mentioned, and to the Bank of England, for the payment of the certificates of the Banking Company. The latter issued their certificates of deposit for £64,868 2s., payable to the order of the complainant Shaw, in the city of London, two years after their date, with interest at the rate of five per cent. The bond and certificates were dated February 28th, 1839, but were not delivered until about the 13th of April, 1839. The certificates of deposit, after being indorsed by Shaw, were delivered to the Bank of England, and the payment of the dividend to the latter was postponed thereby.

The bond delivered by the complainants to The North American Trust and Banking Company, was executed by Gabriel Shaw and Melvil Wilson, in the penalty of six hundred thousand dollars, with a condition in the usual form, for the payment of sixty-four thousand, nine hundred and fifty pounds, two shillings and four pence, sterling money of Great Britain, or the value thereof in coin current, according to the rate of exchange at the time of payment between New York and London, on or before the 28th day of October, 1840, with interest thereon at the rate of seven per cent. half yearly, in the city of New York. Imme-

diately following the preceding condition, and forming a part of it, was a clause in these words, viz.: "As collateral security for the payment of which bond, we have transferred to the said obligee certain bonds, mortgages, stocks, promissory notes, and other securities particularly mentioned and described in the schedule hereto annexed, marked A. And we do hereby authorize him, or his successor or assigns, to sell the same or any part of the same, in default of payment of the said principal sum or the interest to grow due thereon according to the terms thereof. And if the net proceeds arising from such sale be insufficient to pay the said principal sum of money with all interest due, then we are to pay to the said President of the North American Trust and Banking Company, his successor, or assigns, forthwith after such sale, the amount of such deficiency with interest thereon, at the rate of seven per centum per annum."

All the conveyances and assignments of the property and effects referred to in the bond, made by the complainants to The North American Trust and Banking Company, were absolute and unconditional in their terms. But with the securities assigned, the transfers and conveyances, and the bond of Shaw and M. Wilson, Mr. Shaw delivered to the Banking Company an instrument in the form of a letter addressed to Joseph D. Beers, the President of the Company, which was as follows:

"NEW YORK, 13th April, 1839.

SIR:—Thomas Wilson & Co. intending last August to pay a dividend of thirty-three and a third per cent. in London on all their debts and liabilities; the Bank of England then consented to postpone the receipt of the same on the notes and bills held for their account, by the Bank of the United States with the endorsement of Thomas Wilson & Co., it being understood that such dividend was to be secured to the satisfaction of John W. Cowell, Esquire. Payment of this dividend was commenced on or about the 28th of September last, and the bills and notes referred to, now in the Bank of the United States for collection, are assumed to be,

£190,632 15 9

One-third of which amount is, . . . £63,544 05 3

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Amount brought over,	£63,544 05 3
The interest thereon at the rate of five per cent. per annum, from the 28th Septem- ber to 28th February, being	1,323 16 9
	£64,868 02 0

For this amount I have received from you for deposit in the Bank of the United States, as by my letter of this date to Thomas Dunlap, Esquire, President, the sterling certificates of your company, dated the 28th February last, payable two years after date, and bearing interest at the rate of five per cent. per annum. As the said bills and notes shall be taken up or retired by the parties primarily responsible, or by any other parties; or when it is ascertained that any of them have been taken up or retired, so as to remove the responsibility of Thomas Wilson & Co. thereon respectively to the Bank of England, it is provided that thirty-three and a third per cent. on the amount of the said bills and notes, which shall have been so settled, with five months interest thereon at five per cent. per annum, shall be returned to you by the Bank of the United States in your said sterling certificates.

I hand you moreover, as per schedule accompanying these presents, securities which we have received as equal to four hundred and thirty-nine thousand, two hundred and ninety-five dollars, fifty-one cents; but which I estimate for our present purpose, as only three hundred and sixteen thousand and ninety-two dollars, fifty-one cents.

It is understood, that as your certificates are returned to you by the Bank of the United States, you are to return to me an approximate amount of the securities deposited with you at the lowest estimated value. And the amount of these securities which you cannot conveniently give me at one time of settlement, I am to have credit for in the next, and so on, till the whole of your certificates be returned to you, and the whole of the said securities be returned to me.

It is further understood, that in making these settlements for certificates that have been returned to you, and for securities which may be returned to me, we will consider any rise or fall in

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the price of the latter which may have occurred, and make due allowance for the same.

For reasons which will be obvious to you, it is of the highest importance to Thomas Wilson & Co. to be able to command their funds as far as may be proper ; and that we should be at liberty from time to time, to change the securities in your hands, substituting others to your satisfaction. But as it is an operation into which you entered to serve Thomas Wilson & Co., and not with a view to profit, it is very properly required by you, and agreed to on my part, that you should always be on a footing of perfect security.

The instructions of Mr. Cowell, not allowing him to sanction this arrangement, the Bank of England are to have the right at any time within three months to repudiate the same, it being understood, that in the event of such repudiation the whole of your sterling certificates, then in the hands of the Bank of the United States, are to be returned to you, and the whole of the securities not deposited with you, are to be returned to me or duly accounted for.

It is of course, understood, that the securities now pledged to you, or such as may be hereafter pledged in lieu of them, and the proceeds of such securities are specially appropriated, and held by you for the payment and redemption of the certificates received from you, amounting to sixty-four thousand eight hundred and sixty-eight pounds, two shillings. I am aware that it is unnecessary to refer to the special appropriation of the securities ; such being your system in all cases of deposit in trust, but I make it a condition of the present deposit, for the satisfaction of those parties concerned, who may not be acquainted with that system.

It is understood, that pending this operation, we will calculate from time to time, the interest which may have arisen on the sterling certificates received from you, and make such deposit on account of interest as may be requisite.

I am Sir with great respect,

Yours very faithfully,

GABRIEL SHAW.

With respect to the securities deposited, which may be con-

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sidered of a fluctuating value, you will observe on reference to the schedule that they are taken at only \$161,439, though the original cost or valuation was \$284,642.

GABRIEL SHAW."

The transaction was discussed and considered a long time before its terms were agreed upon. Mr. Shaw desired to have the bond contain the provision that the securities and effects were to be appropriated and held by the banking company, for the payment and redemption of their certificates of deposit; but this was opposed by the committee of the banking company, and at length Shaw yielded the point, on the suggestion of their counsel, that a letter written and delivered as before stated, would have the same operation and effect.

The letter was prepared and delivered accordingly. The securities and other papers received on this occasion, from T. Wilson & Co., were put in a trunk and kept by themselves; and were not placed in the same depositories or accounts, as the assets of the banking company in its ordinary business. The officers of the company, understanding such to be the agreement when they were delivered, suffered Melvil Wilson to withdraw some of the securities and to substitute others in their place.

The company in the course of 1839 and 1840, collected from those securities \$20,500, and instead of redeeming their certificates of deposit with the Bank of England, applied the collections to their own affairs. Wilson obtained a settlement of these collections, and on the complainants advancing \$25,000, to the banking company, the latter furnished to Wilson new certificates of deposit for \$45,500, for such loan, and the misappropriated collections. The certificates for \$45,500, were secured by a transfer of mortgages by the banking company, to Henry Yates and others in trust, and usually denominated the Yates Trust.

The banking company never paid any of their certificates delivered to the Bank of England, except eight, in all amounting to £4301, 8s. 8d., which the complainants claimed to have paid; and the residue were still with the Bank of England.

On the 26th or 27th of August, 1841, The North American

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Trust and Banking Company, with the complainant's assent, conveyed and transferred all the collaterals remaining in their hands so received on issuing their certificates of deposit, to Thomas G. Talmage, and Richard M. Blatchford, in trust to hold the same until the one hundred and twenty-six certificates then in the Bank of England, should be returned from London and delivered to the company, and then to transfer the property to the Bank of England.

At this time the company was insolvent, a bill to wind up its affairs was already prepared, and had been, or was about to be served on its president, with notice of a motion for an injunction and the appointment of a receiver. The motion was made and the injunction and receiver granted by the Chancellor, on the 30th day of August, 1841. The defendant Leavitt, was appointed receiver of the company, under that order, and on the 20th of October, 1841, the officers of the institution assigned to him all its property and effects.

The Bank of England forwarded the one hundred and twenty-six certificates to Blatchford, who offered to deliver them to Mr. Leavitt, on receiving a transfer of the collaterals, assigned and conveyed to the banking company, by Thomas Wilson & Co., but Leavitt declined to comply.

The bill charged that those certificates were worthless and void, for all the purposes for which they were taken, and did not render the company liable. It prayed that Blatchford and Talmage, might convey and transfer to the Bank of England, all the remaining property which Thomas Wilson & Co. assigned to the banking company, and account for what they had collected and received.

Mr. Leavitt in his answer, insisted that the conveyance and transfer to Talmage and Blatchford, was illegal and fraudulent, and vested no estate or title in them. He claimed in any event, to have a lien on the property for the bond of Shaw and Wilson, to the extent of all moneys paid or advanced by the company, on the certificates, and the reasonable charges and expenses in respect of the same.

Blatchford and Talmage put in an answer, and submitted to
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account and transfer the securities, under the direction of the court.

George F. Allen, for the complainants.

George N. Titus and *M. S. Bidwell*, for D. Leavitt, Receiver, &c.

THE ASSISTANT VICE-CHANCELLOR.—It is clear that the complainants cannot uphold the title of Messrs. Blatchford and Talmage to the property in question, under the assignment and conveyance dated August 25, 1841. That transaction was so similar in its circumstances, to the one emanating from the same institution, which was before me two years since, in *Leavitt v. Tylee*, (1 Sand. Ch. R. 207,) that I need only refer to my opinion then pronounced, and to say that the grounds of the decree in that suit, are decisive against the transfer to these parties.(a)

Independent of that transfer, the controversy may be thus stated :

The complainants were indebted in a large sum to the Bank of England, of which £63,544 5s. 3d. sterling, was payable in the fall of 1838. They had a large amount of property in this country consisting of commercial paper, stocks and lands; but it was not convertible into money in season to meet their payment to the Bank of England. After a negotiation with the North American Trust and Banking Company, the complainants in April, 1839, transferred and conveyed to that company, property and securities, principally in this city, which were scheduled at nearly \$450,000, and estimated to be worth more than £64,000 sterling. Two of the complainants gave their bond to the same company, for £64,950 10s. 4d. sterling, payable on the 28th day of October, 1840, with interest at seven per cent., half yearly.

(a) A like decision was made in *Leavitt v. Griffin*, March 12, 1846, by the Assistant Vice-Chancellor; setting aside a similar transfer made by the North American Trust and Banking Company, for the benefit of James Holford and The Real Estate Bank of Arkansas.

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On the other hand, the North American Trust and Banking Company, executed and delivered to the complainants, the company's certificates of deposit, for £64,868 2s. sterling, payable to Gabriel Shaw or order, in London, two years after date, with interest at five per cent. These certificates as well as the bond, bear date February 28th, 1839. The certificates were indorsed by Mr. Shaw and delivered to the Bank of England, as a security for the sum due to the latter in 1838, the payment of which was thereupon resented to the complainants.

The North American T. and B. Company failed to pay their certificates, and having become insolvent, went into hands of a receiver in September, 1841; and such of the assigned property as had not been converted by the company, became vested in Mr. Leavitt, the receiver. The bond executed by two of the complainants, has not been paid, and is held by the receiver.

So far, I believe there is no dispute as to the facts. The complainants further allege that the property which they made over to the company, was a collateral security for the payment of their bond, and also for the payment of the company's certificates to the Bank of England. The receiver agrees that the transfer of the property was made as a security, but it was only a security for the payment of the bond to the company. This difference forms the great point in the cause.

I have stated enough of the case to show that the receiver is not correct in his first point, in which he in effect demurs to the bill. If the complainants establish their allegations by competent testimony, they will show an interest which fully entitles them to relief. It is true the Bank of England holds the certificates, but the complainants are the party who is to be the loser if the certificates are not paid. They are liable to the bank for their original debt, as well as by Mr. Shaw's indorsement, and they have a right to enforce the proper application of the property transferred, as a fund for the discharge of those certificates. The Bank of England, as the holder of the certificates, is a proper party defendant. The bank might have been a complainant; but its choice to remain passive, cannot prevent the complainants, also having an interest, from proceeding for its protection.

Before looking into the testimony relative to the disputed fact

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arising upon the complainants' transfer, I must dispose of the serious objection which was so forcibly urged against the testimony, introduced by the complainants to support their position.

The receiver insists, that the contract between the parties, is expressed in the bond which he holds; and that the complainants' testimony being by parol, and offered for the purpose of altering, varying and enlarging the terms of such contract, is wholly inadmissible.

The conveyance and transfer of the property by the complainants, were in their terms, absolute and unconditional. They express no trust, nor have they any reference to either the bond or the certificates of deposit. Both parties concur in declaring that they do not express the true nature of the transaction. Both the complainants and the receiver agree that the property was transferred as a collateral security, and that the surplus belonged to the complainants. The receiver produces a bond, signed by two of the complainants, which recites under their seals, that the property was transferred to secure its payment. The complainants prove in the custody of the receiver, a cotemporaneous writing signed by one of the two complainants who executed the bond, which declares that the property was transferred as a security for the bond and the certificates also. One of the complainants is not a signer of either of these instruments. The North American Trust and Banking Company, did not execute either of them, and they are parties to them only by accepting them. The writing signed by Mr. Shaw, was delivered to the company with the bond and the securities, and there is no evidence that it was ever returned or repudiated.

Why is not the writing, just as competent evidence to show the defeasance upon which this property was transferred, as the recital in the bond? I mean, on the assumption that it was equally known and understood by the company. On that assumption it appears to me, that the transfers, the bond, and the letter of Mr. Shaw, are all to be construed together, as if their terms had been brought into one instrument, executed by both parties. Both the bond and the letter, derogate from the absolute terms of the transfers to the company. But the letter does not detract from the terms of the bond, or diminish its force. The company, with

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the letter engrafted upon the bond, might sue and collect it when it was due, precisely as they could do if the letter did not exist.

The letter therefore, does not conflict with or contradict the bond. It avers another object for which the property was transferred, as security, which may stand with the object expressed in the bond.

Parol evidence has been held admissible for nearly 300 years past, to show a consideration not mentioned in a deed, provided it be not inconsistent with that which is expressed. (*Villers v. Beaumont*, Dyer's R. 146, a; *Clifford v. Turrell*, 1 Y. & Coll. Chy. Ca. 138; and 6 Lond. Jur. Rep. 5; *S. C. on Appeal*, 9 Lond. Jur. R. 633.)

In this view, the letter would be competent, yielding to the bond the force of a contract between the parties relative to the property.

I have mentioned that the bond was not executed by the company. Hence its force as a contract, in respect of this property, rests on its delivery to and acceptance by the company.

Suppose that the property had produced its valuation, or \$120,000 more than the amount of the certificates of deposit; and the complainants had filed a bill for an account of the surplus, to which the company had answered, denying their right and insisting on the absolute terms of the transfers of the property. Would not proof of the delivery of Mr. Shaw's letter, with those transfers, and its acceptance by the company, establish the complainant's right to the surplus? It would, undoubtedly, in my judgment. And if so, it is evidence of the contract between the parties, standing upon the same footing in that behalf as the bond. Next as to the question of fact.

The agreement between the complainants and the company, was made by a committee of the latter, and it is proved to my entire satisfaction, that a part of the agreement was that the property should be held as an indemnity to the Bank of England, and the complainants, for the redemption of the certificates of deposit.

This is the substance of Mr. Shaw's letter. Mr. Graham testifies that it was the understanding, and he explains that it was his objection to having it appear in the bond, which led to its omission there, and the substitution of the letter, as equally oper-

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ative for the complainant's protection. Mr. G. was associated with the special committee, charged with this negotiation and was a member of the finance committee, which directed the acceptance of Mr Shaw's proposition ; and he had the entire charge of perfecting the execution and delivery of the written instruments by which it was consummated.

Mr. Beers, who it is claimed, proves a different state of things, was the president of the company. But he was not a member of either of those committees, and had only a general knowledge of the transaction. He is clearly mistaken, when he says that Mr. Shaw's letter was sent in after the transfers were made. And it is probable that his idea, that the property was security for the bond only, came from his knowledge that there was an objection made and persisted in, to having the bond express any thing more, while he was ignorant of the mode in which Mr. Shaw's object was attained. His views of a trust in relation to that property, show that his mind was impressed with the existence of something beyond the terms expressed in the bond. And finally, contrasting his means of knowledge and his connection with this affair, with those of Mr. Graham, there can be no hesitation in adopting the statements of the latter as the most reliable evidence. There is really no conflict of evidence. The one understood and recollects, what the other either did not know or does not remember.

The other testimony confirms the version of the affair given by Graham. The proof is positive, that Mr. Shaw's letter was delivered to Graham when the securities and property were transferred, and went with the transfers into the vaults of the company. Its delivery to Mr. Graham with the securities, was a sufficient delivery to the company ; but in addition, the indorsement upon the letter, shows that it came to the notice as well as the hands of the cashier of the company, on his receiving the transfers and securities. If the letter were repugnant to the agreement, it ought to have been returned, or the fact notified to Mr. Shaw. Neither was done, and the silence of the officers of the company must be deemed evidence that the letter expressed the agreement. The subsequent dealings of the company with the securities, confirm this inference. They were kept separate

from the assets of the company. The commercial paper was not treated as the company treated their discounted bills and notes. The complainants were permitted to withdraw and substitute securities, as is provided in Mr. Shaw's letter, and which is not expressed in the bond. And when the company were brought to an account for \$20,500, of the collaterals which they had collected and omitted to apply in redeeming their certificates of deposit, they gave their obligations for the amount, instead of indorsing it as a payment on the complainant's bond, which was the natural and obvious mode of settling the \$20,500, if the securities were collateral to the bond alone.

The question as to the legality of the certificates of deposit, was argued, but I deem it unnecessary to decide it. The receiver insists, that the complainants are not at liberty to set up the objection that the certificates were illegal or void; and that the point is not properly presented by the pleadings.

The bill does not allege that they were *illegal*, or contrary to law, but simply that they were void and did not subject the company to any liability. This might be because of an excess of power in issuing them; and does not involve any violation of positive law in which the complainants participated. It therefore does not prevent the complainants from relying upon the void nature of the consideration which they received, for the transfer of their property to the company. But whether void or valid, is indifferent to the complainants, if the property be applied for their redemption.

Another point is made in respect of the post notes of the company given on the settlement for the \$20,500, collected out of the assigned securities. It does not appear to be necessary for me to decide this question. Assuming for the argument, that the receiver is right, and the post notes were void and illegal; the whole transaction is void, and the company stands liable for the money collected and misapplied. To that extent, as a transaction growing out of the transfer of the securities, I think the complainants are entitled in this suit to be declared creditors of the company.

The loan of \$25,000 accompanying this arrangement does not necessarily enter into the controversy about the property assigned

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and conveyed in 1839. And as the validity of all these post notes, constituting what is usually called the Yates trust, has been fully argued, and is under advisement in another branch of the court; I prefer not to pass upon it in this case.

The complainants are entitled to a decree for the transfer of the remaining property to themselves or the Bank of England, on delivering up the certificates of deposit which are outstanding. The sum paid by the company in redemption of their certificates, should be offset against the sum collected by them out of the securities transferred. For the balance, if against the company, the complainants, or the Bank of England, will be declared creditors. And if the balance be in favor of the company, it must be paid to the receiver, by the complainants. The questions arising upon the Yates trust post notes for the \$25,000, must be reserved.

As to costs, each party must bear their own. The receiver did right in respect of his trust, to defend the suit, and that trust must re-imburse him. I perceive no ground upon which he can be allowed costs against the complainants, or which is the same thing, out of the fund in question. He is not the trustee of that fund, and the cases cited by his counsel, were those where the trustee, acting for the protection of his trust, was allowed costs out of such trust.

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CUTLER and others.

A defendant who sets up an equitable title to land, against a mortgagee in good faith of the legal estate without actual notice; in order to affect the latter with constructive notice, by means of his possession at the date of the mortgage, should allege in his answer that he was then in possession, claiming the land as his own. It is not sufficient to allege that the defendant was in possession at, and long before, the execution of the mortgage.

Such an equitable owner of a farm cannot enforce his right against one, who, on the faith of the legal owner's recorded title, purchased another farm of the latter,

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charging it with a fixed proportion of a mortgage given by such owner on both farms ; the purchaser having no notice of the equity in respect of the former. Where one defendant in a foreclosure suit, sets up equities against his co-defendants, respecting the order of sale of different portions of the mortgaged premises ; the decree of sale may direct the master to ascertain and settle those equities and to sell the premises accordingly.

Oct. 16 ; December 30, 1845.

THIS was a bill to foreclose a mortgage for \$4000, dated November 29, 1832, and executed by Abraham Cutler and his wife to the complainants, on one hundred and six acres of land in the town of Lodi, Seneca county, and one hundred and eighty acres in Hector, Tompkins county. Several parties were made defendants, as occupants and subsequent purchasers and incumbancers.

The defendant Young answered, claiming to be the owner in equity of the farm in Lodi, by a title superior to the mortgage, as well as to the judgments against Cutler. After stating the facts upon which his equity rested, he averred that the complainants had due notice of its existence when the mortgage was executed. He also alleged, that he had been in the undisturbed possession of the farm ever since 1798.

The Seneca County Bank set forth the purchase of the Lodi farm by them, under a judgment against Cutler, in December, 1834, and claimed to be the owners of the equity of redemption. They, and also the infant heirs of N. Shannon in their answer, stated that N. Shannon bought the Hector farm of Cutler, who conveyed the same to him under a valid agreement, by which he assumed \$2500 of the complainant's mortgage as the share of that farm, and Cutler was to pay the balance in respect of the Lodi farm. Shannon thereupon paid the residue of the price.

The facts which Young claimed to have established, and on which he averred his ownership, were as follows :

Prior to 1818, Cutler procured Young, who was his father-in-law, to become his surety on debts owing by him to two mercantile firms in New York. Judgments were recovered on those debts, by virtue of which the Lodi farm, which was then owned by Young, was sold and bid off by Mr. Platt, the attorney for the creditors, to whom the sheriff conveyed it in 1818. Between

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that period and 1828, Cutler paid to the plaintiffs in the judgment an amount satisfactory to them, and thereupon in 1828, their attorney released and conveyed the farm to Cutler.

The complainants proved that in 1832, on the application of Cutler as the owner of the farm and finding his title to be perfect they made him a loan on the mortgage in suit.

The defendant proved that he had been in possession of the farm for forty years, but he failed to make out that the complainants or their agent knew or were informed of his possession or claims, before or when the mortgage was given.

W. Betts, for the complainants.

A. Thompson, for the defendant Young.

E. Sandford, for the Seneca County Bank.

H. S. Walbridge, for the Shannon infants.

THE ASSISTANT VICE-CHANCELLOR.—The legal title to the farm in Lodi, was regularly vested in Cutler, when he executed the mortgage to the complainants. The defendant Young, is wholly mistaken when he says that he never was divested of his title, and that Cutler never was seised of the farm.

His real ground of defence is, that Cutler, ever since 1828, has owned the farm in trust for him ; having a naked legal title, but without any interest.

I deem it unnecessary to examine this point, because admitting all that Young claims for it, he does not establish a defence to the mortgage.

He does not claim that the mortgage is affected by the trust, unless the complainants had notice of its existence. Young's answer alleges that they had *due notice* ; but it does not state in what manner it was given to them.

At the hearing it was argued that there was both direct and constructive notice of the trust to the complainants when they took the mortgage.

1. As to direct notice, the testimony wholly fails to establish it.

2. Then as to the constructive notice. The answer alleges that Young has been in the undisturbed possession of the farm ever since the year 1798. Mrs. Cutler proves that he has been in possession for forty years. This is relied upon to show notice to the complainants of his equitable rights. The answer does not allege, nor is there proof, (Cutler's testimony being laid aside,) that the complainants knew or were informed of this possession. It therefore rests on the sole fact that Young occupied the land.

I think the answer does not go far enough, to enable the court to infer notice, under the circumstances of this case. Young's title was divested in 1818 or 1819. There is no pretence that he had any title, legal or equitable, from thence till 1828, though he remained in possession. Then from 1828, to October, 1843, when his answer was put in, he remained in the occupation of the farm in like manner. He knew in 1828, that Cutler had taken a deed of the farm in his own name. Yet we have neither allegation or testimony, that during the next fifteen years, Young ever claimed the land, or did a single act inconsistent with Cutler's full ownership, or indicating any intention ever to interfere with his title.

Under such circumstances, it was incumbent on Young, if he relied on his possession as being notice to the complainants, to state in his answer that he was in possession of the land at the date of the mortgage, claiming it as his own; and to have proved the character of his possession accordingly. As the case stands, all that he has stated or proved, is entirely consistent with his having been occupying by the mere sufferance of Cutler, or as a tenant under him; and for aught that appears, if the complainants had been put upon inquiry by learning of his possession, they would on inquiry have found that he was such occupant or tenant. He does not allege or prove that Cutler was not in possession in 1833, by Young's actual possession under him.

The legal presumption is, that after 1819, Young was occupying under Platt, the owner of the land. So far as the complainants had any information, they had a right to rely upon the legal presumption that the possession followed the title under Cutler, as well as under Platt. And Young has not alleged or proved sufficient in regard to the character of his possession, (when it is

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considered in connection with the other circumstances,) to deprive the complainants of the benefit of that presumption, or to subject them to the doctrine of constructive notice of Young's alleged rights, as it is maintained in some of the cases, upon possession alone.

I will not therefore enter at all into the controverted questions growing out of that doctrine.

There is another difficulty in the way of Young's defence, which arises from the sale of the Hector farm, to Shannon. Young sets forth this sale, and he does not deny but that Shannon bought in good faith. Nor does he pretend that Shannon had any notice whatever of his equitable claim to the Lodi farm, or of any fact which would preclude Shannon from bargaining with Cutler, on the assumption which Cutler's legal title warranted, that the complainant's mortgage was a valid and perfect lien on both of the farms.

Therefore on Shannon's taking a conveyance of the Hector farm, subject to \$2500 only of this mortgage, on the faith of Cutler's legal and recorded title to both farms, Young's latent equity in the Lodi farm, cannot be permitted to intervene to cast a greater burthen than the \$2500, on the Hector land.

Shannon on purchasing a legal title in 1837, was not bound to inquire the state of the possession of the Lodi farm in 1833, and cannot be affected by any doctrine of constructive notice in this suit.

The equitable set off which Young brings forward, in Cutler's claim on Shannon, growing out of the Hamilton mortgage; if not altogether too remote, is too vaguely presented to authorize any decree in regard to it.

This is not the proper stage of the cause, for settling the controversy between Young and the Seneca County Bank.

There must be a decree for a sale of the premises. The Lodi farm is to be sold for the \$1500, and arrears of interest, and the Hector lands for the \$2500, and interest. The answer of the infants sets forth various equities in respect of the order of sale of the latter, and the decree will direct the master to settle those equities and sell the premises accordingly.

The costs occasioned by Young's defence, must be borne by

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him. The residue of the complainant's costs and those of the guardian *ad litem*, are to be apportioned on the two farms, in the same ratio as the mortgage debt.

The other questions between the parties, are not to be affected by the decree.

H. BEECKMAN, Surviving Executor of M. Beeckman v. SCHERMERHORN and others.

A testator gave real and personal estate in trust, to be applied for the use of six brothers and sisters, until the youngest of them or the survivor of them should arrive at the age of twenty-one, upon which the trustees were to convey the estate, or what remained, to those six persons, or the survivor or survivors of them, their heirs and assigns forever, share and share alike. And if either of the six should die before the coming of age of their youngest brother or sister, leaving lawful issue, the share of the one so dying should be conveyed to such issue.

One of the sisters married, had issue a son, and died, before the youngest of the six became twenty-one, leaving her child and husband surviving. *Held*, waiving the question as to her own interest, that on her death, her son took a vested remainder in fee in the real estate, and a vested interest in the personal property, to the extent of her sixth part.

Also, that on the son's death, his father became entitled to his share of both the real and personal estate.

October 16; December 31, 1845.

THE bill in this cause was filed to settle the construction of the will of Marte Beeckman, who died in 1826, leaving real and personal estate, in the county of Rensselaer.

The facts, so far as they were material to the decision were substantially as follows: The testator 1st, directed the payment of his debts: 2d, he gave and devised one fourth of his real and personal estate to his nephew John Beeckman Junior; 3d, he gave and devised one-fourth of such estate to Henry Beeckman; and 4th, one other fourth of the same to Cornelius Beeckman. He then devised and bequeathed in these words:

"Fifth. I give devise and bequeath unto John Beeckman Jr., and Henry Beeckman, the remaining one fourth part of all my estate, both real and personal, whereof I may die seised or pos-

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sessed : to have and to hold the same to them, the said John Beeckman Junior and Henry Beeckman, their heirs and assigns forever ; upon trust nevertheless, that they the said John Beeckman Jr., and Henry Beeckman or the survivor of them their heirs or assigns, shall and may possess, occupy, assign, sell, lease and dispose of the same upon such terms, and in such manner as they shall deem proper, for the use, benefit and advantage of John Beeckman, Hester Beeckman, Martin Beeckman, Maria Ann Beeckman, Henry Beeckman and Cornelius Beeckman, children of my deceased nephew, Leonard Beeckman, until the youngest of the said children of my said deceased nephew or the survivor of them, shall arrive at the age of twenty-one years, upon the happening of which, they the said John Beeckman Jr. and Henry Beeckman, or the survivor of them, their heirs, executors, or administrators, shall convey the said one-fourth part of my real and personal estate, or such part thereof, as shall then remain in their hands undisposed of, to the said John Beeckman, Hester Beeckman, Martin Beeckman, Maria Ann Beeckman, Henry Beeckman and Cornelius Beeckman, or the survivor or survivors of them, their heirs and assigns forever, share and share alike, the one no more thereof than the other.

And if either of the said children of the said Leonard Beeckman deceased, shall die before the coming of age of their youngest brother or sister, leaving lawful issue, then the share of such deceased child or children, shall be conveyed to the lawful issue of such child, or children."

The youngest child of the testator's nephew, Leonard, arrived at the age of twenty-one, on the 11th day of August, 1842. Hester, one of the children of Leonard, intermarried with Peter Prosius who subsequently died ; and after his death, and during the minority of the youngest of Leonard's children, Hester also died, leaving her surviving, her lawful issue by Peter Prosius, the three infant defendants in this suit, who were all born before the 11th day of August, 1842.

Maria Ann, another of Leonard Beeckman's children, intermarried with Isaac V. Schermerhorn, by whom she had one child, a son. She died in 1833, and her child died in 1834, be-

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fore the youngest of Leonard's children arrived at the age of twenty-one years.

Isaac V. Schermerhorn claimed his wife's portion of the testator's estate, as heir at law of his own child.

In behalf of the infant defendants, it was insisted that Schermerhorn took nothing under the will, and had no interest or right in the estate real or personal.

They claimed one fifth of the one-fourth of the testator's estate, as the heirs and next of kin of their mother, Hester Prosius.

If Schermerhorn's claim were valid, their interest would be only one-sixth of the fourth part of the estate.

The other adult defendants did not litigate the question.

D. Codwise, for the complainant.

D. Buel, Jr., for Isaac V. Schermerhorn.

John M. Platt, for the infant defendants.

L. Robinson, for the other defendants.

THE ASSISTANT VICE-CHANCELLOR.—In my view of the statute of descents, it is not material to determine the point made by Schermerhorn's counsel, that his wife Mary Ann, took an estate in fee under the will. The case relied upon, *Kingsland v. Rapelye*, (3 Edw. Ch. R. 1,) is a strong authority in his favor. But the devise here is distinguishable from the one in that case, in two important features. The property is vested in trustees, who were to retain the entire legal estate until the youngest of Leonard Beeckman's children attained his majority; and the trustees were empowered to apply the capital of the estate, as well as the income, for the use of all the children in the mean time.

Waiving the consideration of this point, my construction of the will is, that without regard to the nature of Mrs. Schermerhorn's estate, and assuming for this purpose that it was not vested; on her death, her son took a vested absolute estate in her share of the property.

The terms of the will are explicit, that in the event which happened, "the share of such deceased child shall be conveyed to the lawful issue of such child."

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There is no condition imposed that the issue shall continue alive till the majority of Leonard Beeckman's youngest child. That period is fixed for the termination of the trust estate, and for consequent actual possession of the parties entitled. It has nothing to do with the vesting of the interests.

When Mrs. S. died, leaving issue, there was a determinate person, in whom the estate was fixed, to remain after the particular estate vested in the trustees was spent. The interest of her daughter was no more contingent, than is the estate of B. in the very common devise to A. for life, with remainder to B., in fee. Unless B. survives A., he will never come into possession; but he has a vested remainder, which will descend to his heirs precisely as if he were in its actual enjoyment.

There is no devise over, upon the death of the issue; and this furnishes another reason, if any were necessary, for holding the interest of such issue to be vested.

As to the personal estate, *Roebuck v. Dean*, (4 Bro. C. C. 403, S. C. 2 Ves. Jr. 265;) is directly in point, to show that it vested in the son of Mrs. S. on her death. To the same effect are *Skey v. Barnes*, 3 Mer. 335; and *Harrison v. Foreman*, 5 Ves. 207. The latter is in favor of the position that Mrs. S.'s interest was vested; liable to be divested on the contingency of her death before her youngest brother became of age. And see *Locker v. Bradley*, (5 Beav. 593; S. C. 6 Lond. Jur. R. 1098.) In *Sturgess v. Pearson*, (4 Madd. 411,) the bequest was of the income to A. for life, and after her decease, to be equally divided among her three children, or such of them as should be living at her death, to be paid to them at their age of twenty-one years. A. survived all her children. Sir John Leach, V. C. held that all the children took vested interests, which passed to their representatives.

In regard to the real estate; the child of Mrs. S. at her death, took a vested remainder in fee, beyond all question; assuming still that Mrs. S. had only a contingent or defeasible estate herself. In *Williamson v. Field's Executors and Devisees*, (July 21, 1845,(a)) I examined this subject much at large, and refer-

(a) Since reported in 2 Sand. Ch. R. 531.

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ring to that case, and the treatises, I will dismiss the point. (2 Cruise's Dig. 260, 270, 271; Title, Remainder, Chapt. 1; 1 Preston on Est. 64, 67; *Doe v. Perryn*, 3 T. R. 484.)

When the child of Mrs. Schermerhorn died, he was seised in fee of one sixth of the real estate, and absolutely entitled to one sixth of the personal property remaining in the hands of the trustees, for Leonard Beeckman's children; subject to the trust while it was to continue. His father was entitled to his personal estate under the statute of distributions.

He also took the real estate of his son, pursuant to the provisions of the statute of descents, as amended in 1830. (1 R. S. 751, § 5; Laws of 1830, ch. 320, s. 13.)

There must be a decree, declaring the construction of the will accordingly, with costs to the respective parties out of the personal estate.

DE KLYN v. WATKINS and others.

The jurisdiction of the court of chancery, in a case of fraud, of trust, or of contract, is sustainable, wherever the person sought to be affected is found; although lands not within the jurisdiction of the court, may be affected by the decree.

A bill was filed in this state, against several defendants, of whom one lived in New Jersey, but was served with process here. The principal subject of the suit, was land in New Jersey, owned by that party, but land in New York was also affected; and the ground of the suit, was a fraudulent transfer of the whole, executed here. *Held*, that the court had jurisdiction to set aside the conveyance and make a decree against the New Jersey defendant and his lands.

Oct. 20, 1845; January 2, 1846.

THE bill was filed in September, 1841, by several of the children and heirs of Barent De Klyn, against Charles De Klyn, Charles S. Watkins, William H. Ireland, and Joseph Ireland; all of whom were served with process, and put in answers. The facts, so far as they are pertinent to the legal points reported, are stated in the judgment of the court. On the cause being brought to a hearing, it was suggested by the counsel, that in respect of

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Watkins, the principal defendant, and of the property which alone was attainable in the suit, there was a question of jurisdiction raised in his answer, which if decided in his favor, would virtually put an end to the suit; and there was a great mass of testimony to be read and considered, if the merits of the controversy were to be disposed of. They therefore asked to have the point of jurisdiction heard and decided, before going into the merits. The court acceded to the request of the counsel, and the suit at this time, was argued on the single question thus presented.

A. Benedict, for the complainants.

B. W. Bonney, for the defendant, Watkins.

THE ASSISTANT VICE-CHANCELLOR.—So far as it concerns the question of jurisdiction raised by the defendant Watkins, the case may be thus stated. B. De Klyn, being seised of lands in this city and in New Jersey, together with some personal property, was induced to convey and make the whole over to his son Charles, by various fraudulent practices of the latter, and without consideration. Charles subsequently failed, and assigned the property to the defendants, W. H. and J. Ireland, for the benefit of his creditors. The assignees sold the land in New Jersey, at auction, and Watkins became the purchaser, with notice of the alleged fraud. The De Klyns and the assignees reside in this city, the fraudulent conveyances were obtained and executed here, and the sale at auction was made here. Watkins resides in New Jersey, but was served in this city with the subpoena to answer in this suit. The bill prays to have the conveyances executed by B. De Klyn set aside, and to have the lands in New Jersey, as well as here, re-conveyed to his heirs.

The defendant's counsel attempted to make a distinction between a suit to compel the specific performance of a contract for the sale of lands in another state, and this case, which he said was one relating exclusively to the title of land, and as local in its nature as an action of trespass *quare clausum fregit*, at law.

The counsel was well aware, that the court had uniformly de-

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creed the performance of such contracts, whenever it had jurisdiction of the defendant's person, from about 1663, when *Archer v. Preston* was decided, until the present day. (1 Eq. Cas. Abr. 133, pl. 3; S. C. stated in 1 Vern. 77, by Lord Nottingham; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; *Ward v. Arredondo*, Hopk. R. 213; *Shattuck v. Cassidy*, 3 Edw. Ch. R. 152.)

It is difficult to perceive why a bill to set aside a conveyance of land situated abroad, relates to the title of land, any more than one to have a conveyance decreed. In each case the object is to divest the title from the person who holds it, and in each it is attained in the same mode, by the process of the court against the person of such owner.

I find that the authorities are decisive against the distinction claimed by the defendant.

In the case of the *Count Arglasse v. Muschamp*, (1 Vern. 75, and again at page 135,) the court of chancery in England, relieved against the grant of a rent charge upon lands in Ireland, the defendant being served with process in England. The decision was made in the first instance by Lord Nottingham, and was confirmed on a re-hearing, by Lord Keeper Guildford.

In *Lord Cranstoun v. Johnston*, (3 Ves. jr. 170,) Sir R. P. Arden, Master of the Rolls, in a well considered judgment, set aside on the ground of fraud, a purchase made by a creditor on a sale of lands in Jamaica, under a judgment obtained by him there. After citing the cases, he says, "They clearly show that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situated in England. Lord Hardwicke lays down the same doctrine," (citing 3 Atk. 589.)

The reference to the *British dominions*, does not affect the weight of the authority, for the action of the court could not reach the land itself any where out of England.

In *Guerrant v. Fowler*, (1 Hen. & Mun. 5,) the court of chancery in Virginia, entertained a suit to set aside a deed obtained by fraud, the lands being in Kentucky, and one of the two defendants residing in that state.

In *Massie v. Watts*, (6 Cranch, 148,) where the court sustained

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the jurisdiction in the Kentucky Circuit, relative to lands in Ohio, on the ground of a constructive fraud ; Chief Justice Marshall lays down the principle, that in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The Chancellor recognizes this principle in *Mead v. Merritt*, (2 Paige, 402,) and *Mitchell v. Bunch*, (2 *ibid.* 606 ;) and it is conclusive in favor of the jurisdiction of the court, upon the case made by the bill.

The defendant's objection is therefore overruled, and the cause must be heard on its merits.

Order accordingly.(a)

FROST v. FROST and BEVINS.(b)

Where tenants in common unite in executing a joint mortgage, for a joint and several debt, one of them has no equity to compel the mortgagee to receive half the debt, and to proceed against his co-tenant's moiety for the collection of the other half, although he tender a sufficient bond of indemnity against eventual loss. Nor on a foreclosure against both mortgagors, will a decree be made for a sale of the undivided moieties separately, for the respective half parts of the debt. The doctrine of principal and surety is not applicable, and the creditor is entitled to receive his whole debt, or to have the usual decree for a sale of the whole premises.

Albany, January 12th, 1846.

THIS was a suit to foreclose a mortgage, executed by James Frost Jr. and John L. Bevins, on two small lots of ground at Spraker's Basin, in the county of Montgomery. The mortgagors

(a) The suit was brought to a hearing before the Assistant Vice-Chancellor, on the merits, in June, 1846 ; and on the 24th of July, he dismissed the bill with costs. The hearing occupied five days, but there was no legal question involved, of sufficient interest to be reported.

(b) This cause, and several others in this volume, were heard at a special term held at the capitol in the city of Albany, on the 12th day of January, 1846.

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owned the premises as tenants in common. On one of the lots a large stone building was erected, sufficiently capacious for two stores, and which by means of a partition had been so occupied.

The complainant held a subsequent mortgage given by J. Frost Jr., on his undivided half part, including another house and lot. Before the suit, Bevins offered to pay to the complainant one half of the sum due on the first mortgage, requiring him to foreclose Frost's undivided share of the premises for the collection of the other half, and offering an indemnity against loss. The complainant refused to accept payment of a part of his debt.

The cause was heard on the pleadings and proofs as to Bevins who answered, insisting on these facts.

J. C. Wright, for the complainant.

The only real question is as to selling these premises in parcels; whether one of two mortgagors has a right to insist on a foreclosure against the other, on the former paying to the mortgagee one-half of the amount due. We contend he has no such right; especially where the property mortgaged is indivisible. In a partition, this store would have to be sold entire. A sale in undivided moieties will lessen the amount which should be realized from it, and we as junior mortgagees of one half, have an equity to prevent such a loss. No case can be found for selling indivisible property in halves, or selling undivided half parts on a mortgage of the whole.

We were not bound to receive a bond of indemnity as to half the debt, and be turned over to a suit at law on personal security in case of a deficiency.

The complainant has nothing to do with the equities between the mortgagors, both of whom are liable to him jointly and severally, and each for the whole. There is no suretyship as to him, or for him; nor is there any between the mortgagors until one of them pays the debt.

R. W. Peckham, for the defendant, Bevins.

Each of these parties in respect of the other, is a surety for half

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the debt. It is not material whether the store can be sold in parcels. What is the objection to selling equal undivided moieties, under the decree? If we pay half of the debt, who is bound to pay the other half? Equity requires each to pay half. (*Henry v. Henry*, 10 Paige, 314.)

A decree may be made between co-defendants, and here there is a *prima facie* equity for such a decree. (*Jones v. Grant*, 10 Paige, 348.) The complainant's object in having the whole sold, is not to collect his debt, but to buy the property for less than its value. He wants to sell our half to make Frost's half better. His second mortgage has no bearing on the case. There is no marshalling of assets here. (4 J. C. R. 17; 1 *ibid.* 415.)

THE ASSISTANT VICE-CHANCELLOR, said there can be no sale in divided parcels here. One of the mortgagors has no more right in the east half or the west half of the store, than the other. The complainant as second mortgagee, has no particular equity. He stands in the place of J. Frost Jr. as to Bevins' right, in respect of that mortgage, and cannot force on a sale of B.'s half of the property to pay his first mortgage.

On the other hand, both of these parties are principal debtors, each liable to the complainant for the whole debt secured by the joint mortgage, and he has a right to compel either of them to pay the whole. So the doctrine of surety is not applicable. They joined in mortgaging the premises, and probably by that act, intended to have a sale of the whole, if any sale ever became necessary. This is the more probable, because the legal presumption as well as the proof is, that the property will not sell as well in undivided moieties as the whole would together. If they had intended a different result, they should have given separate mortgages. A mortgagor under the circumstances here disclosed, is entitled to receive his entire money, or to have a sale of the whole premises. He cannot be driven to sell an undivided half part, for the payment of half of his debt.

In regard to a decree for Bevins against his co-defendant, the latter is not represented here. He was called upon to answer the bill, and has had no opportunity to answer the claim of Bevins.

There must be the usual decree for a sale of the mortgaged

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premises, and Bevins must pay the additional costs incurred by the complainant in consequence of his putting in an answer.

Decree accordingly.

NEW v. BAME.

An answer stated the execution and delivery of an assignment in trust for creditors, and referring to the instrument, averred that a copy of it was set forth in a schedule annexed, to which the defendant referred as a part of his answer. The answer then stated the recording of the instrument on the day of its date, and mentioned the book in which it was recorded. The schedule contained the assignment at length, acknowledged before a commissioner of deeds.

Held, that the deed might be read at the hearing, under these allegations.

Albany, January 14th, 1846.

THIS was a judgment creditor's suit, which was heard on the pleadings and proofs. The answer, among other things, stated that on, &c., the defendant executed and delivered to W. A. D., an assignment of all his real and personal property, except such as by law was exempt from execution, in trust for the payment of his debts ratably, &c.; "as by reference to the said assignment will more fully and at large appear, a copy whereof is hereunto annexed, marked A., and to which this defendant begs leave to refer; and that the same may be accepted and taken as a part of his answer; and which said assignment was accepted by the said W. A. D., and on the day of its date, was recorded in the office of the clerk of the county of Columbia, in book F. F. of deeds; as by the certificate of the clerk thereon indorsed, will also appear."

The complainant objected to the reading of this deed in evidence, under the statement in the answer.

The other matters involved, were of no general interest.

J. C. Newkirk, for the complainant.

K. Miller, for the defendant.

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THE ASSISTANT VICE-CHANCELLOR, decided that the assignment was so far set out, or distinctly referred to, in the answer, as to enable the defendant to read it at the hearing, under the seventy-fifth rule of the court. That the answer and schedule together, stated it as a deed duly acknowledged and recorded.

A decree was made for the complainant.

KING and others v. McVICKAR, J. L. LAWRENCE, administrator,
&c., and others.

J. L. LAWRENCE, administrator, &c., v. KING and others.

A mortgagor, and one to whom he had subsequently conveyed part of the lots mortgaged, subject to a portion of the debt, applied to a banker to advance money to satisfy the mortgagee. The banker made the advance, on such grantee of part of the lots, agreeing to take an assignment of the mortgage for his benefit and security, as against the lots remaining in the mortgagor; half the sum requisite to satisfy the mortgagee, being furnished at the time, ostensibly by the grantee. Payment was made to the mortgagee, who assigned the mortgage to the grantee; and he soon after cancelled it of record, without the assent or knowledge of the banker.

Held, that the transfer for the benefit of the latter was valid, and the subsequent discharge of the same was void, and that he could re-instate the mortgage, and foreclose it against the lots still owned by the mortgagor, and against a second mortgagee of the same, whose lien was prior to the cancelment, but subsequent to the first mentioned mortgage.

After the first mortgage was cancelled, the banker to secure his advance, obtained from the grantee who cancelled it, a mortgage on other lands of some value; and subsequently the grantee gave to him another mortgage on those lands, to secure debts due to the banker as trustee. After this he conveyed the lands to the banker in fee, in trust for several persons. It appeared that as between the original mortgagor and such grantee, the latter was liable in respect of his lots formerly subject to the mortgage, to pay a part of such advance. *Held*, that on the banker's re-instating and enforcing the original mortgage, the second mortgagee stood in the place of a surety for such grantee to the extent of his liability to make good the advance, and was entitled to that extent, to the benefit of the subsequent security taken for the advance, by the banker, from the grantee.

Held also, that such equity of the second mortgagee, could not be enforced against the beneficiaries under the conveyance to the banker in trust, until they were made parties to the suit.

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A cross bill in behalf of the second mortgagee to enforce such an equity, will be sustained.

Where there is to be a long controversy as to the extent of the equity of a second mortgagee, who is entitled to a subsidiary security obtained by the first mortgagee; the civil law rule of subrogation will be adopted, and a decree for the satisfaction of the first mortgage made at once, instead of requiring the holder thereof in the first instance to resort to his ancillary security.

The decree will at the same time, provide for the second mortgagee's right of subrogation to such security.

Parties acquiring liens or interests subsequent to the recording of a mortgage, must notify the same to the mortgagee, if they wish to influence or control his action in respect of the lands mortgaged.

The recording of a mortgage is not notice of its existence to a prior mortgagee.

A party setting up a prior legal right in an answer, is not bound to deny notice of a subsequent lien or interest, unless such notice be distinctly alleged against him. The rule is different, where one is resisting a prior title, on the ground that he purchased in good faith, without notice.

An assignment of a mortgage to one who has taken a conveyance of a part of the mortgaged premises from the mortgagor, will not operate as a merger in respect of the premises still owned by the latter.

Oct. 21, 22, 23, 1845; February 4, 1846.

THE first cause was a bill filed October 7th, 1842, by James G. King, Edward Prime, Samuel Ward and Denning Duer, transacting business under the name and firm of Prime, Ward & King; against Benjamin Vickar and Isaphene, his wife, John L. Lawrence, administrator, &c., of Isaac Lawrence, deceased, and William Beach Lawrence. All of the defendants suffered the bill to be taken as confessed, except J. L. Lawrence, administrator, &c., who put in an answer, setting up against the claim of the complainants, various rights and equities founded upon the right of McVickar to compel W. B. Lawrence to relieve the lands in question from such claim, and insisting that those lands were not liable.

In May, 1843, J. L. Lawrence, administrator, &c., commenced the second suit above entitled, by filing a cross bill against the complainants in the first suit, together with McVickar and wife, and W. B. Lawrence and Esther R., his wife. Answers to this bill were put in by W. B. Lawrence, and by Prime, Ward and King. Replications were filed to the answers in both suits, and testimony was taken. W. B. Lawrence was examined as a wit-

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ness for the complainants in the first suit, and B. McVickar for the complainant in the cross suit.

The causes were heard together on the pleadings and proofs.

It is not deemed necessary to state the pleadings at large ; and instead of inserting the testimony, the report of the case contains the material facts as ascertained by the court, which were as follows :

On the 16th of October, 1838, McVickar was seised in fee of a parcel of land in the city of New York, extending from Eighth to Ninth streets, and from the Sixth Avenue, eastwardly 227 feet, six inches, except a lot, 75 feet by 23½ feet, fronting on Sixth Avenue, at the corner of Ninth street. The property was known as lots numbers 5, 7, 9, 11, 13 and 15, Eighth street, numbers 321, 323, 325, 327, 329 and 331, on Ninth street, and 100, 102, 104, 106, 108, 110, 112 and 114, Sixth Avenue. In all this property, W. B. Lawrence claimed, and had an interest as equitable owner, in common with McVickar. Previously and on the first day of July, 1836, McVickar had executed his bond for \$50,000, and he and his wife had executed their mortgage to secure the bond, to W. B. Lawrence, on the twelve lots on Eighth and Ninth streets above described. On the 12th day of July, 1836, W. B. Lawrence assigned the bond and mortgage to The American Life Insurance and Trust Company. The mortgage and assignment were recorded July 15, 1836.

On the 23d of May, 1837, McVickar and wife executed a mortgage to the same American Trust Company, on the four lots on Sixth Avenue next above Eighth street, and known as numbers 100, 102, 104 and 106. This mortgage was recorded in July, 1837, and was given as further security for the debt secured by the former mortgage.

On the 16th of October, 1838, McVickar executed his bond, and he and his wife executed their mortgage to the same Trust Company, for the payment of \$55,000, on all the lots above mentioned. The mortgage was recorded October 18th, 1838. The sum advanced on this bond and mortgage, was only \$45,089 90 ; and on the 7th of March, 1839, the Trust Company by reason of the deficiency, released from all their mortgages, the lot designated as *seven*, Eighth street. On the first of September, 1839,

the Trust Company released and discharged number 9, Eighth street, in like manner.

On the 12th of February, 1840, McVickar and wife executed a mortgage to Isaac Lawrence, upon all the before mentioned premises and other lands, to secure him for all advances and liabilities by him made to or incurred for McVickar, and to indemnify him against the same. The mortgage was recorded three days after its date. At the period of these suits, the premises mortgaged were insufficient to satisfy those liabilities and advances, and McVickar was unable to pay any deficiency.

On the same 12th of February, W. B. Lawrence and wife executed a mortgage for the like purpose to Isaac Lawrence, which was recorded the same day, and conveyed with other real estate, all his right, title and interest, in the lots herein before described. In 1842, the premises subject to this mortgage, were entirely inadequate to pay the amount claimed to be due upon it; and the mortgage was not able to pay any deficiency.

On the 1st day of June, 1840, the American Trust Company discharged from their mortgages, the four lots, 114 Sixth Avenue, and 327, 329 and 331, Ninth street, for the consideration of \$28,250, and received for that sum in the aggregate, four mortgages of McVickar and wife, one on each of the lots released. These mortgages were recorded in September, 1840, and in the same month, were assigned by the American Trust Company to The New York Insurance Company, to secure \$20,000. Isaac Lawrence at the same time executed an instrument, giving to these four mortgages priority over his mortgage executed by McVickar.

At this time there remained due to American Trust Company, including their interest in the four mortgages held by The New York Insurance Company, about \$68,089 90.

On the 8th day of March, 1841, Isaac Lawrence released to McVickar lot 331 Ninth street, from the lien of his mortgage. The release was recorded the same month.

On the 15th day of May, 1841, McVickar and W. B. Lawrence made a division between themselves, of the premises still subject to the three American Trust Company mortgages first mentioned, and apportioned upon each lot, a share of the amount due on

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those mortgages. The division embraced other lots, on which there were similar apportionments of liens. In this apportionment, there fell to W. B. Lawrence, the lots 325 Ninth street, 100, 102, 104 and 106, Sixth Avenue, and 5, 13 and 15, Eighth street; subject to the payment of \$35,750 in the aggregate, to the American Trust Company on the original mortgages. And McVickar received lots 321 and 323 Ninth street, 11 Eighth street, and 108, 110 and 112 Sixth Avenue, subject in like manner to the payment of \$21,750, on the old mortgages.

Besides these, 327 and 329 Ninth street, were allotted to W. B. Lawrence, subject to \$8000, on each of the mortgages assigned to the New York Insurance Company; and 331 Ninth street and 114 Sixth Avenue, were allotted to McVickar, subject, the former to \$8000, and the latter to \$4250, of the same mortgages.

Isaac Lawrence's administrator, claimed that on this division, W. B. Lawrence was bound to pay to the American Trust Company in the whole, \$40,422 57, and McVickar \$25,327 43; besides the proportion each was to pay to the New York Insurance Company. And each was to bear one half of the sum due to the Trust Company, not included in the apportionment.

On the 15th of May, 1841, McVickar and wife, conveyed to W. B. Lawrence, in fee, the lands which in the foregoing division were allotted to him. The deed expressed a consideration of \$74,250, and was recorded June 19, 1841. At the date of this deed, Isaac Lawrence released the lots thereby conveyed, from the mortgage executed to him by McVickar, and the release was recorded at the same time with the deed. Until this time, W. B. Lawrence had no legal title to the lots conveyed to him by McVickar. The division and apportionment between those parties, and the agreements respecting the same, were not recorded. The deed and the release of Isaac Lawrence, were the only instruments which appeared on the record.

Prime, Ward & King, were ignorant of the matter, except that they were informed that McVickar had conveyed to W. B. Lawrence, certain parts of the property mortgaged to the American Trust Company, and that a part of the indebtedness to the company was apportioned among the lands, allotted to the parties respectively, and the residue was to be borne by them equally.

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Previous to June 1841, an agreement was made between W. B. Lawrence and McVickar, and the American Trust Company, by which the latter agreed to receive their own certificates of deposit then outstanding, in payment of the indebtedness to them on McVickar's mortgages. The sum then due to them was about \$76,784 66, and their certificates could be bought in the city of London, for about sixty cents on the dollar.

W. B. Lawrence and McVickar thereupon applied to Prime Ward & King, for their aid in obtaining such certificates, through their correspondents in London, Messrs. Baring, Brothers and Company; who upon their intervention, purchased sterling certificates of the American Trust Company, amounting to £20,000.

These certificates were received by Prime, Ward & King from Baring, Brothers & Co., on the 10th day of June, 1841, with instructions to deliver the same to W. B. Lawrence, on receiving in cash, the balance due for their cost, which calculated to August 31st, when the remittance therefor would be realized, amounted to £10,274 10, or in dollars at the then rate of exchange, \$50,048 93. The residue of the cost of the certificates £2000, had been remitted to them by W. B. Lawrence. Of the sums paid for this remittance, he and McVickar had each furnished a portion. They differed widely as to the sums which each had advanced for the purpose, McVickar claiming he had paid all that his lots were chargeable with in the apportionment, and W. B. Lawrence insisting that he had advanced nearly the whole sum himself. The testimony left this matter in great obscurity.

On the 19th day of June, 1841, Prime, Ward & King delivered the Trust Company certificates to W. B. Lawrence, and received from him \$25,048 91, which sum he then alleged to them, he had obtained in whole or in part on the security of a portion of the lands mortgaged, which had been conveyed to him by McVickar in May preceding. He requested a few days delay for the payment of the balance of \$25,000 for the certificates, avowing the object to be, to enable McVickar to obtain it by loans on the property incumbered in favor of the American Trust Company; the loans were stated to be in progress, and from them Prime, Ward & King were to be paid. At the time of the request for delay, it was agreed between them and W. B. Lawrence (as-

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suming to act also for McVickar, and authorized by McVickar to do whatever was needful to effect the arrangement with the American Trust Company;) that on delivering the certificates to that company, instead of satisfying their mortgages executed by McVickar, which were a lien on his lots as set off in the division; the bonds and mortgages should be assigned to W. B. Lawrence, and held by him on account of and for the benefit of Prime, Ward & King.

W. B. Lawrence delivered the requisite certificates of deposit, to the American Trust Company, and they assigned to him the three bonds and mortgages of McVickar heretofore described.

The assignment was dated and recorded June 18th, 1841, and expressed the consideration of \$68,534 66, the principal and interest then due to the Trust Company on the three mortgages.

Prime, Ward & King, as a further security for the \$25,000, balance due for the certificates, took a joint and several note for that sum, dated June 19, 1841, signed by W. B. Lawrence and by Isaac Lawrence, payable with interest on the 15th of August following. The latter was the father of W. B. L. and the father in-law of McVickar, and was then reputed and believed to be a man of great wealth, and as being a sufficient surety for that amount. Previously, and on the 12th of June, Isaac L. had written a letter to Prime, Ward & King, agreeing to guaranty the payment by W. B. L. of the £20,000, of certificates, if they would deliver them to W. B. Lawrence.

McVickar and W. B. Lawrence, succeeded in negotiating a loan of G. Barclay, which was to pay off Prime, Ward & King, and which loan Isaac Lawrence was to guaranty, and was to give it priority over his mortgage against McVickar; and W. B. Lawrence, being about to leave for a long absence, to enable McVickar to complete the loan in his absence, without the knowledge, assent or authority of Prime, Ward & King, on the 24th day of June, 1841, executed satisfaction pieces of the three Trust Company mortgages which had been assigned to him, and the same were recorded the same day, and the mortgages thereby cancelled of record. Prime, Ward & King, claimed that this act and the cancelment, was null and void as against them.

The Barclay loan was by agreement changed to other lands

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of McVickar and W. B. Lawrence, and securities thereon for \$20,000, with the bonds of those parties, were prepared and signed; but before Isaac Lawrence's signatures were obtained to the guaranty and priority agreement, he died suddenly, intestate, on the 12th day of July, 1841. This wholly defeated the loan from Mr. Barclay. No payment of any part of the \$25,000 and interest, was ever made to Prime, Ward & King, and they claimed in their bill, that the same was due to them on the mortgages to the American Trust Company so assigned for their benefit, and cancelled without their authority. They thereupon prayed a foreclosure and sale of the lands which were subject to those mortgages when they were so assigned, and payment of the \$25,000 and interest, out of the proceeds of the sale. They alleged that the following lots of McVickar, were still subject to the mortgages, and not conveyed or incumbered except to Isaac Lawrence, viz. lots 11 Eighth street, 321 and 323 Ninth street, and 108, 110, and 112, Sixth Avenue.

John L. Lawrence was appointed administrator of Isaac Lawrence, on the 19th day of November, 1841, and on an investigation of his affairs, it was found that his estate was insolvent to a large amount.

McVickar claimed that he had advanced to W. B. Lawrence, about \$14,800, of the \$25,048 93, which he paid to Prime, Ward and King, on receiving the certificates. On the other hand, W. B. Lawrence insisted, that he had furnished the whole of this sum from his own funds and means, by a mortgage to the Equitable Insurance Company on five of the lots which McVickar had conveyed to him in May preceding.

At the time of the transfer of the three original mortgages, the Trust Company also transferred to W. B. Lawrence, their surplus interest in the four mortgages of McVickar assigned to the New York Insurance Company. It was also claimed by Isaac Lawrence's administrator, that the Trust Company allowed to W. B. Lawrence \$83,761 92 for the certificates he delivered to them, and that the sum beyond paying the debt on the McVickar mortgages, was applied to the settlement of a note of W. B. Lawrence's.

It appeared that on the same 18th day of June, 1841, W. B.

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Lawrence and his wife executed a mortgage to the New York Equitable Insurance Company, for \$25,000, (with his bond for the same sum,) on the lots 5 Eighth street, and 100, 102, 104 and 106 Sixth Avenue. This loan enabled him to pay to Prime, Ward & King, the \$25,048 93, paid in cash on the delivery of the certificates of deposit.

W. B. Lawrence and wife, on the 1st day of November, 1841, executed a mortgage to James G. King, on the undivided half of six lots, on Union Square, and on four lots near the former, to secure the payment of the note of \$25,000, signed by W. B. and Isaac Lawrence in June preceding. This mortgage was recorded January 21, 1842. The premises had been discharged by Isaac Lawrence in his life time, from the lien of the mortgage executed to him by W. B. L. Of the ten parcels thus mortgaged to Mr. King, six were foreclosed and sold under prior mortgages, leaving but little surplus; and the residue were incumbered, two of them to an amount exceeding their value. The other two were undivided interests.

On the first day of August, 1842, W. B. Lawrence and wife executed a mortgage to James G. King, on the same lands included in the mortgage of November 1st, 1841; to secure to him any liability of W. B. L. to him individually, or as a trustee for others. This mortgage was recorded November 9, 1842.

It appeared that on the 26th of April, 1843, J. G. King became entitled by a decree in chancery, to recover a deficiency of \$10,051 26, on the foreclosure of a mortgage executed by W. B. Lawrence in 1837, to Mr. King, as trustee under the will of Rufus King. Isaac Lawrence was liable as guarantor of the debt, and his administrator was a party to the foreclosure. An execution for this deficiency, was returned wholly unsatisfied in 1843.

Of the lots which W. B. Lawrence obtained by the deed of McVickar in May, 1841, five were mortgaged to the Equitable Insurance Company, as before stated. The lots 13 and 15 Eighth street, were mortgaged for \$6000 by W. B. Lawrence and wife to Morris Robinson, on the 16th day of November, 1841; and he having assigned the mortgage to The New York Life Insurance and Trust Company, December 29th, 1841, W. B. L. and wife on the same day executed to the latter, a further mortgage thereon

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for \$3000, and to answer all other liabilities of W. B. L.'s. The lots 327 and 329 Ninth street, which were not subject to the American Trust Company's three mortgages in May, 1841, were subject to mortgages for \$12,000, executed to that company and assigned to the New York Insurance Company.

On the 29th of March, 1842, W. B. Lawrence conveyed to James G. King, in trust, the two last mentioned lots, and the five lots mortgaged to the Equitable Insurance Company. The trusts were, for the benefit of the wife of W. B. L. during her life as to the income, and upon her death to convey the premises in fee to such of her issue as she should appoint, and in default of appointment, then to her issue ; with sundry powers of disposal and investment in the trustee. This deed was recorded April 21, 1842.

The lot 325 Ninth street, was mortgaged by W. B. L., on the 1st day of November, 1841, to secure \$3385 50, to the representatives of W. and R. Bruce.

The lots embraced in all the conveyances and mortgages of W. B. Lawrence heretofore stated, and which had been conveyed to him by McVickar, had been released by Isaac Lawrence from the lien of his mortgage against McVickar.

In his cross bill, Isaac Lawrence's administrator prayed to have the securities held by James G. King, and by Prime, Ward & King, marshalled ; and that they should resort for their \$25,000 and interest, first to the mortgage to Mr. King of the 1st November, 1841, on the Union Square lots, and to their other securities, aside from the American Trust Company mortgages ; and to be restricted under the latter, if capable of being enforced, to the balance of the sum which McVickar assumed in the apportionment, as between him and W. B. Lawrence. The cross bill was founded on the alleged rights and equities of McVickar against W. B. Lawrence, at and prior to the cancelment of the American Trust Company mortgages, and the lien of Isaac Lawrence's mortgage against McVickar upon the lots which Prime, Ward & King sought to foreclose.

The answer of W. B. Lawrence to the cross bill, insisted that he had paid more than his share of the amount, which in respect of his lots, he was bound to pay of the American Trust Com-

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pany debt. He objected that the cross bill was improperly filed, and insisted on its being dismissed with costs. The course which the causes took at the hearing, renders it unnecessary to state more of the case made by Mr. Lawrence.

James G. King, Jr., and Daniel Lord, for Prime, Ward & King.

G. M. Ogden and David B. Ogden, for J. L. Lawrence, administrator, &c.

W. B. Lawrence, in person.

Mr. *King*, for the complainants in the original suit, made the following points :

I. The agreement made by Prime, Ward & King, with William Beach Lawrence, that the latter should take from The American Life Insurance and Trust Company, an assignment of the mortgages held by the company on the property of Benjamin McVickar, and hold them as security for the re-payment to Prime, Ward & King of twenty-five thousand dollars, advanced by them to enable McVickar and Lawrence to carry out the negotiation by which the company were to receive their own certificates of deposit in exchange for the mortgages held by them on the property on Sixth Avenue, Eighth and Ninth streets ; was a valid agreement, and can be enforced in a court of equity. (*White v. Knapp*, 8 Paige, 173 ; *Green v. Hart*, 1 Johns. R. 580, 583, 590 ; *Runyan v. Mersereau*, 11 Johns. 534 ; *Jackson v. Blodgett*, 5 Cowen, 202 ; *Deverich v. Baines*, Prec. in Chan. case 3 ; *Baily v. Boulcott*, 4 Russell, 345 ; *Nab v. Nab*, 10 Mod. R. 404 ; *Benbow v. Townsend*, 1 M. & K. 506 ; 2 Story's Eq. Jur. 280, § 972 ; 2 Fonbl. Eq., ch. 2, § 4, note a ; *Moses v. Murgatroyd*, 1 J. C. R. 119 ; 3 Rev. St. 658, § 2—2d ed., Reviser's Notes.

II. William Beach Lawrence was the representative of both McVickar and Isaac Lawrence in all these transactions. They were aware of what he had done, and did not at the time, nor afterwards, notify Prime, Ward & King of their dissent from the

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arrangement he had made, and are consequently bound by his acts.

III. The cancelment of the mortgages by William B. Lawrence, without consideration, and without the knowledge of Prime, Ward & King, was unwarranted, and in fraud of their rights, and did not divest the latter of their previously acquired rights, nor give McVickar and Isaac Lawrence any new or better rights. And Prime, Ward & King are entitled to a decree for foreclosure and sale of the premises, as if such cancelment had not been made. (2 Story's Eq. Jur. 629, § 1258; 1 *ibid.* 120, § 109.)

IV. The rights of Prime, Ward & King to the decree sought for, are irrespective of any state of accounts between McVickar and W. B. Lawrence. Even if McVickar had paid to W. B. Lawrence all which as between them he was bound to pay of the indebtedness to The American Life Insurance and Trust Company, and was in no ways indebted to William B. Lawrence on other accounts; the fault of his representative, if fault there were, must fall on him, and not on innocent parties dealing with his representative; and if McVickar cannot claim the benefit of such alleged payments, Isaac Lawrence, whose claim would be a derivative one from McVickar, can claim no more than the latter.

V. The defendant John L. Lawrence, shows no grounds for marshalling the assets, and compelling Prime, Ward & King to resort first to the mortgage on the Union Square property. (*Dorr v. Shaw*, 4 John. Ch. R. 17; *Ex parte Kendall*, 17 Vesey, 520; *Ellison v. Booth*, 19 Johns. 493; 1 Story's Eq. Jur. 651, § 634.)

VI. The complainants are entitled to a decree of foreclosure and sale, as prayed for by them, and to payment out of the proceeds, of the \$25,000 due them, and to a decree that the cross bill be, as against them, dismissed with costs.

The Messrs. *Ogden*, for J. L. Lawrence, administrator, &c., argued upon the following points:

1. The cross bill was properly filed. We seek to compel the complainants in the first suit, to satisfy their debt out of other property than that mortgaged to our intestate.

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2. The great question is, by whom, and out of whose funds, the \$25,000 ought to be paid. We claim that the complainants are only general creditors of Isaac Lawrence on the guaranty, having no right to set up the American Trust Company mortgages at all. And if they have such right, that then they can obtain only half of their debt from McVickar, the debtor of the intestate.

3. Those mortgages were regularly cancelled of record, before the death of Isaac Lawrence, and their discharge remained unquestioned from June 19, 1841, to December 15, 1842, when the complainants had ascertained that their other securities were insufficient.

4. Though the legal title was in McVickar when the mortgages were given, W. B. Lawrence had an interest in the property, and they were given for the benefit of both parties, who were joint mortgagors in equity.

5. Isaac Lawrence's mortgages were executed in 1840, the complainants knew of his mortgages, when they derived their rights. His mortgage against W. B. Lawrence became operative, when McVickar conveyed the lots to him. (Perkins, § 533; 4 Kent's Com. 98.)

6. The complainants had notice of these mortgages by the record in the office of the register of deeds.

7. They have voluntarily abandoned their claim against W. B. Lawrence's lots; and they have no right to be paid the whole out of McVickar's. The mortgages if cancelled in part, are cancelled in the whole. It is a joint debt—an entirety.

8. The mortgages were only to be held by W. B. Lawrence till Isaac Lawrence executed his guaranty. This is shown by the dates. The latter was executed June 19th. All the other transactions were on the 18th of June.

9. The complainants knew of W. B. Lawrence's interest in the property when it was mortgaged, and of the conveyance to him by McVickar subject to a part of the mortgages. They were bound to inquire as to the extent of that charge, and are therefore chargeable with notice of the division of the lots and the apportionment on each.

10. By that apportionment, W. B. Lawrence was to pay in re-

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spect of his lots, \$35,750, and McVickar was to pay \$21,750, of the three mortgages to The American Life Insurance and Trust Company. The overplus was to be borne equally. In fact, McVickar had paid over \$24,000, or more than his share, when the mortgages were assigned by the company, and W. B. L. had paid only about \$11,000. He was thus deficient, the very amount advanced by the complainants.

11. The complainants are bound by the division and apportionment, and by this result; and they have no equity to compel McVickar's lots, to pay the sum they thus advanced for W. B. Lawrence.

12. Isaac Lawrence's administrator, standing as a surety, has a right to require the complainants to exhaust the security afforded by W. B. Lawrence's mortgages to James G. King, before resorting to the lots of McVickar which are subject to the intestate's mortgage.

THE ASSISTANT VICE-CHANCELLOR.—At the time the transaction in controversy was brought to a close with the American Life Insurance and Trust Company in June 1841, their mortgages executed by Dr. McVickar, were indisputably valid liens upon fourteen lots of ground, eight of which had been conveyed by McVickar to W. B. Lawrence on the 15th of May preceding, and six were still owned by McVickar himself.

So far as the Trust Company is shown to have had any notice, the whole sum requisite to discharge their mortgages was a charge upon all the lands mortgaged, and that company might have released any of the lots, without being subjected to loss in consequence of any equities of Isaac Lawrence, or any existing between Dr. McVickar and W. B. Lawrence.

Prime, Ward & King became interested in the subject matter, on their advancing the \$25,000, on the purchase of the Trust Company's certificates. So far as they were chargeable with notice, on succeeding to those mortgages in the manner which they allege in their bill, the mortgages were the first lien on those fourteen lots, and valid for the \$50,048 93, which was payable for the Trust Company certificates. They received \$25,048 93, of W. B. Lawrence, and advanced the residue, as they insist, on

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the security of the mortgages upon the lots still owned by McVickar.

The first issue made by the original suit, is on the fact of their having thus made the advance.

On this point, the testimony is direct and positive, that they delivered the certificates to W. B. Lawrence, upon his agreeing to take an assignment of the mortgages from the Trust Company, and to hold them as a security, so far as it respected Dr. McVickar's lots, for the payment to them of the \$25,000.

The circumstances relied on by the counsel for Isaac Lawrence's administrator, as casting doubt upon this agreement, are nearly all explained by the fact that the affair occupied two days in its adjustment, and some of the papers were dated on the 18th of June and some on the 19th, although in legal consideration to be deemed as cotemporary writings.

The next question presented in the original suit, is as to the right of the complainants to make such an agreement, or to set up the mortgages when assigned, against the lands of McVickar only.

As to this, there is no technical difficulty in the way. W. B. Lawrence was not the mortgagor in either of the mortgages. And as to the lots owned by McVickar, an assignment to W. B. Lawrence would not operate as a merger. As to his own lots, it might so operate, *pro tanto*, unless there was an intention to the contrary; but that could not affect the lots still vested in the mortgagor, where the intention was express, to keep the mortgages outstanding.

The objections to the complainants' right are, that the debt was in equity a joint debt of McVickar and W. B. Lawrence; that the lands mortgaged had been divided, and the greater part of the debt apportioned upon those conveyed to W. B. Lawrence, who was bound to pay such apportionment; and that McVickar had furnished to W. B. Lawrence, all, or nearly the whole of the amount which in respect of the lots retained by him, he was liable to pay towards the purchase of the certificates which were to discharge the mortgage. Also that Isaac Lawrence had a junior mortgage on McVickar's lands, and his rights are impaired by the proceeding which the complainants seek to enforce. The

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objections assume that the complainants were chargeable with direct or constructive notice of all these matters.

1. As to the character of the mortgage debt to the Trust Company. It was at law, the sole debt of McVickar. There was no joint personal liability of W. B. Lawrence, and in one of the mortgages he was the mortgagee. So far as notice to the Trust Company is concerned, there is no proof that they ever knew of W. B. Lawrence's interest in the property, either before or after the conveyance to him on the 15th of May, 1841. The complainants are therefore not subjected to any notice through their assignors.

As to the complainants themselves, I think it sufficiently appears that they were aware of the fact that W. B. Lawrence had claimed an interest in the mortgaged premises before the division in May, 1841, but this interest did not make him a joint debtor, even in equity. His equitable right or interest in the lands, (if he really had any right beyond an honorary one,) was subject to the mortgage debt, but he was not personally liable.

In May 1841, the division and apportionment was made, embracing lots not subject to these mortgages, and other mortgages on such lots. Mr. King knew that there had been a division of the lands between McVickar and W. B. Lawrence, but he knew nothing of the particulars, or of the apportionment. It is evident that he had been informed of the execution by McVickar of a conveyance of some of these lots to W. B. Lawrence, but it does not appear that he had seen the deed, or heard of its contents. The deed was not recorded till the 19th of June; and if it had been recorded a month before, the record would not have been notice to the prior mortgagee.

This presents the whole subject of notice to the complainants, as it is disclosed by the proofs. Now what were the legal and equitable presumptions, which Mr. King was authorized or required to entertain, from all that he had thus learned? The mortgages which he was about to obtain, were executed on fourteen lots. The title at that time was in one man, the actual interest in two. These men had divided the lots between them, and the one having the legal title, had conveyed to the other the lots assigned to the latter. Mr. King had never heard what shares

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each had in the lots originally ; nor what proportion of them had been assigned to the one or the other in the division ; nor how they had arranged the liens in respect of such lots, if they had arranged them at all. It appears to me that the just and only inference which he could deduce from the facts known to him was, that the parties had an equal interest originally, and that on their division they had made an equal distribution of the lots and of the mortgage debt. I am not sure that he was bound to draw any inference from such information, which was to affect his dealing with the securities.

But it may be said he was put upon inquiry by these facts ; it was incumbent upon him to ascertain McVickar's rights. As representing the first lien, (when he became assignee,) I think he was not called upon to pursue these inquiries. He could stand upon the recorded mortgages, unaffected by events subsequent to their being recorded, unless such events were distinctly presented to his consideration. It was the duty of parties who had acquired subsequent rights in the property, or whose existing rights had become changed ; to notify the same to the mortgagees, if they were liable to be affected by the action of the latter.

In this case, the complainants succeeded to all the rights of the Trust Company, and are not liable by reason of constructive notice of the apportionment made on the division of the lands.

There is no evidence that either the Trust Company or the complainants had any information of the alleged payments by Dr. McVickar to W. B. Lawrence, towards the former's portion of the cost of the Trust Company certificates.

As to the junior mortgage of Isaac Lawrence, I find no proof that the complainants or their assignors knew of its existence. It was argued, that the complainants ought to have denied notice in their answer to the cross bill. I think not, because the cross bill did not allege notice. It is not like the case of a defendant resisting a prior or better title, on the ground of a bona fide purchase without notice. Here the parties answering the cross bill, were meeting an equity which was set up against their elder and prior legal right.

Then it is said that the record of Isaac Lawrence's mortgage

was notice to the complainants. This would be true if they were purchasers of the property mortgaged to Isaac Lawrence. But in fact they are purchasers of a title prior to his, and they were not required to search the records posterior to the date of that title. The recording of a deed or mortgage, is not notice of its existence to a prior mortgagee. (*Stuyvesant v. Hone*, 1 Sand. Ch. R. 419.)

The result is, that when the complainants stipulated for the assignment in question, they had a right to assume that the \$50,048 93, payable to the Trust Company, was a charge devolving equally upon McVickar and W. B. Lawrence, and that the lots of each were to bear an equal proportion of the burthen. On delivering the certificates, they received from W. B. Lawrence, a trifle more than half of that sum, and probably knew that he raised it upon a mortgage of five of his lots which were under the Trust Company mortgages. They were therefore warranted in assuming that Dr. McVickar and his lots, were to pay the remaining \$25,000; and it was both competent and proper for them to take an assignment of the mortgages, and hold it as security against his lots for the repayment of that sum.

The subsequent cancellation of the mortgages, did not impair the complainants' rights as against the parties now before the court. Dr. McVickar participated in the act, and neither Isaac Lawrence or his administrator, have derived any new rights, or parted with any securities in consequence of the cancellation. It was wholly unauthorized as to the complainants, a violation of their rights, and as to them is void. On the case made by the original bill, the complainants are, in my judgment, entitled to the relief which is therein prayed.

The equity which the administrator of Isaac Lawrence sets up in the cross bill, aside from his defence to the original suit, may be thus stated. Admitting that Prime, Ward & King, were entitled to advance their \$25,000, upon an assignment of the Trust Company mortgages, and to hold them against Dr. McVickar's lands; yet in point of fact, as between him and W. B. Lawrence, Dr. McVickar was not obligated to pay that \$25,000. Mr. W. B. Lawrence ought to pay a considerable part of it, if not the whole. Isaac Lawrence, as a junior mortgagee of Mc-

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Vickar's lots, had an equity to compel W. B. Lawrence to discharge his portion of the \$25,000, in order to relieve those lots of McVickar's, and thus to benefit Isaac Lawrence's security. That W. B. Lawrence could not by his own act, in discharging the Trust Company mortgages, so far as they were a lien on his land, without paying his just proportion of the \$25,000, defeat this equity of Isaac Lawrence. That Prime, Ward & King, having obtained from W. B. Lawrence, a mortgage for the further security of this \$25,000, the administrator of Isaac Lawrence, is entitled to the benefit of that mortgage, so far as to exonerate McVickar's lots from W. B. Lawrence's just proportion of the \$25,000. And it is alleged, that the lands thus mortgaged to Prime, Ward & King, are still liable to be subjected to this equity, unaffected by any subsequent *bona fide* conveyance or incumbrance.

In answer to this claim made by the cross bill, it is insisted, first, that the case thus stated, furnishes no ground for marshalling the assets, and compelling Prime, Ward & King, to resort in the first instance to the mortgage given by W. B. Lawrence; and *Ex parte Kendall*, (17 Ves. 520,) and *Dorr v. Shaw*, (4 J. C. R. 17,) are relied upon as authorities.

In both of those cases, the attempt was by a junior lien creditor of B., to compel a senior lien creditor of A. and B., to exhaust A.'s property first, without showing any equitable right in B. to have the latter debt charged on A. alone. Lord Eldon said, and Chancellor Kent adopted his language, that there must be a right in the creditors of B., founded on some equity of B., giving him *as a surety* or otherwise, a right to compel A. to pay the joint debt; that it must appear to be just and equitable that A. *ought to pay in the first instance*, or else there is no equity to compel the creditors to go against A., who have a resort to both funds.

In my view, these authorities sustain the principle of the cross bill. On the case stated, when McVickar conveyed the lots to W. B. Lawrence in May, 1841, by force of the apportionment of the liens, the lots of the latter as between himself and McVickar, became liable to discharge \$45,939 90, of these mortgages to the Trust Company. As to this sum, he was the principal debtor in equity, and McVickar was his surety in respect of the

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lots of McVickar still liable to the mortgages, as well as by force of his personal liability on the bonds accompanying the mortgages. Therefore, when the mortgages were discharged, McVickar had as against the lots of W. B. Lawrence, the precise equity which Lord Eldon and Chancellor Kent described, as entitling one of the joint debtors to require the other to discharge the obligation. This was an equity which was bound by the lien of Isaac Lawrence's mortgage, and his representative may avail himself of it. (*Kellogg v. Wood*, 4 Paige, 578.) McVickar's assent to the discharge of the mortgages cannot affect this lien, both because he had no right to impair it, and because his assent appears to have been given under the expectation that his lots, as well as those of W. B. Lawrence, were to be actually discharged.

According to the cross bill, W. B. Lawrence has not satisfied the amount for which McVickar's lots were incumbered in his behalf; hence the equity which I have described, continued to the extent of his deficiency, as between him and McVickar, and the junior mortgagee of McVickar, is thus placed in the relation of surety for W. B. Lawrence in respect of the junior mortgage on these lots of McVickar's.

In reply to the claim of the administrator of Isaac Lawrence to have the \$25,000 mortgage to Mr. King marshalled, it is shown, that in August, 1842, W. B. Lawrence executed a further mortgage to Mr. King, on the lands conveyed by the mortgage of November 1, 1841, to secure any indebtedness of W. B. Lawrence to Mr. King, individually and as trustee, which was not otherwise secured; and it is then shown, that Mr. King as trustee, has such a claim against W. B. Lawrence, to more than \$10,000, for which Isaac Lawrence was liable as guarantor.

I think this second mortgage does not impair the right of the administrator to relieve McVickar's lands through the first mortgage to Mr. King. Mr. King is not a mortgagee who has advanced money upon the faith of the second mortgage. He obtained it for a precedent debt, and has not parted with any security or property, in consequence of its execution. His equity is therefore no better than that of McVickar and his mortgagee, and theirs being prior in time, must prevail. The guaranty of

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Isaac Lawrence does not affect the question, as the case is presented here. Before giving it effect, (if such a circuitous equity could be permitted,) it would be necessary to understand the state of the accounts and other securities existing between Isaac and W. B. Lawrence, between Isaac Lawrence and McVickar, and possibly those between the Lawrence's and Mr. King himself.

No question of parties is raised in respect of these mortgages, and as the last mortgage was in Mr. K.'s name, without any addition as trustee, there is no occasion for further parties, or of designating him as trustee in order to proceed with the cause.

The cross bill states a conveyance by W. B. Lawrence to Mr. King, as trustee for Mrs. W. B. Lawrence, of various lots which were subject to the Trust Company mortgages, and seeks to have the benefit of those mortgages against such lots also, by way of substitution, to make good W. B. Lawrence's deficiency in paying the same. As to two of those lots, (327, and 329 Ninth street,) there is the further ground, that the mortgages thereon held by the New York Insurance Company, cover in addition to their debt, a portion of the Trust Company debt, which was discharged by the certificates in June, 1841, and as to such portion, McVickar and his mortgagees have a right to the benefit of those mortgages, in respect of W. B. Lawrence's deficiency. These questions affect the rights of the children *in esse*, of Mrs. W. B. Lawrence, as the persons presumptively entitled to the remainder of the trust estate, and they, as well as the trustee as such, should be parties to the suit, before the court can properly dispose of them.

It was objected to the cross suit, that it sought to introduce, and have a decree upon new subjects of litigation, wholly unconnected with the original suit; and *Galatian v. Erwin*, (Hopk. R. 48, & 8 Cow. 361,) was cited. In that case the decree sought in the cross suit, was based upon the entire overthrow of the original suit, besides relating to lands not affected by the original bill. The relief sought in this cross bill, proceeds upon the footing that the claim in the original suit is proper, but that the relief therein ought to be decreed against others of the defendants, and other property than that sought to be primarily charged. I have no doubt but that it is a proper case for a cross bill.

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I have now gone over the points of law raised by the cross bill, and will next consider the only disputed fact which I deem material to the proper disposition of the cause at this time, which is whether W. B. Lawrence has paid his proportion of the Trust Company mortgages.

In this inquiry, I set out with the apportionment made between him and McVickar in May, 1841, and I must say unhesitatingly, that there is no mode of stating the transaction upon that basis, by which I can make out that he has paid the share of those mortgages, which he assumed upon his lots in the apportionment. Whether the Trust Company debt embraced in the mortgages assigned to the New York Insurance Company, be included or omitted; and whether the calculation be made on the full amount of the Trust Company debt, or upon the sum which was required to pay for the certificates with which it was discharged; the result is in this respect, the same.

In this conclusion I leave out of view, the sums which Dr. McVickar says he paid towards those certificates, and take all that Mr. Lawrence gives as paid by himself. I do this irrespective of the propriety of McVickar's claims; it being unnecessary at this time, to decide their validity.

The question arises between Mr. King and the administrator, and the answer of W. B. Lawrence is not to be weighed in disposing of it.

In my view therefore, the cross bill is sustained in its principle, and the administrator of Isaac Lawrence is entitled to a part of the relief for which he prays.

As to a portion of his case, further parties are requisite, and the cross bill must stand over, to enable him to bring them before the court. Inasmuch as the case may be varied by the issues which may arise between him and the new parties, I will not at this time enter into the details of the payments made by McVickar and W. B. Lawrence respectively, towards the purchase of the Trust Company certificates. I trust, when that question comes up for decision, it will be better elucidated by the testimony, than it seems to be by the papers before me.

To recur to the original suit. The complainants have a clear right to enforce the amount due to them against the lots of Dr.

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McVickar. Although by Mr King's vigilance, a subsidiary security has been obtained, to which the cross bill shows a qualified right, on the complainants' debt being paid, it would be inequitable and unjust, longer to delay their remedy against the primary fund, in order to settle the controversy between these other parties, in which they have no interest. This consideration is strengthened by the fact, that the further delay occurs in consequence of the omission of parties in the cross bill. I feel warranted therefore, under the circumstances, in adopting the civil law rule of subrogation, instead of requiring the complainants in the first instance to resort to the ancillary securities for their debt.

The complainants in the original suit, may have a decree reinstating the Trust Company mortgages against the lots of McVickar, and for a sale thereof to pay the amount remaining due to them on the \$25,000, and their costs of that suit. The same decree will declare that Isaac Lawrence's administrator is entitled to the benefit of the mortgage to Mr. King, dated November 1, 1841, (after the payment of such amount to the complainants,) to the extent of so much of the \$25,000, and interest, as W. B. Lawrence's lots ought to have paid, and which is collected out of the lots of McVickar. It will further direct that the cross bill stand over, with leave to the complainant therein to add parties, and reserving all the other questions and directions growing out of the cross suit; with liberty to apply &c., and for any party to set it down as upon the equity reserved, on the complainants' omission to proceed. On amending the cross bill, the complainant must pay the defendant's costs of the hearing.

As the suit is to stand over, it is not proper in this stage of it, to make a final disposal of the case between the administrator and W. B. Lawrence.

Decree accordingly.

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LIFE INSURANCE AND TRUST COMPANY and others.

When a person in want of money, applies to a capitalist for his note payable at a future day ; offering as security, his own obligation, with an indorser or a mortgage ; and the respective obligations are executed accordingly ; the transaction is a loan.

When two persons, who are both desirous to raise money, exchange their own notes to be used for that purpose with third persons ; it constitutes an exchange of securities merely. The effect is the same as if each had used his own note, with the other's indorsement.

A banking company in New York, which had stopped payment, being desirous of borrowing a large sum of money, applied to a Trust Company usually lending money in New York, for a loan of their certificates of deposit payable at short dates, and offered to secure the payment of the amount, by their own obligations and a mortgage on real estate of sufficient value. The Trust Company agreed to issue their certificates bearing five per cent. interest, payable in London within two years, for £48,000, sterling, on receiving the bank's promissory notes for £50,000, sterling, payable in London at the rate of \$5 for each £1 sterling, with six per cent. interest, within seven years ; secured by a conveyance of the real estate to trustees, containing a provision that the bank should pay to the Trust Company in New York, the respective instalments of the £50,000, with interest at seven per cent. forty days before each instalment should mature in London, at the rate of \$5, for every £1 sterling. It was understood by the parties, that the Trust Company would negotiate the bank's obligations in London, with their own guaranty, in order to meet their certificates of deposit. The arrangement was consummated between the parties.

Held, 1. That the transaction was a loan by the Trust Company to the bank, and not an exchange of paper, or a sale.

2. That the reservation of £2000, or four per cent. on the principal sum secured to be paid, rendered the contract usurious.

The notes of the bank were negotiated in London, to bankers there. *Held*, nevertheless, that the contract was governed by the laws of New York.

Whenever a commission, in addition to legal interest, is charged by the lender, on discounting a bill or note, or on making advances thereon, unless it be for some real service distinct from the loan itself, and then be a moderate and reasonable charge ; it will be referred to the use of the money loaned, and render the transaction usurious.

On applying for a loan, the borrower offered to the lender's agent a collateral advantage, which was likely to be prejudicial to the former, and was certain to be

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profitable to the latter. The offer was accepted and the loan was made. *Held*, that the offer constituted one of the terms and conditions of the loan.

November 12, 13, 14, 15, 1845 ; February 6, 1846.(a)

THE bill in this cause was filed September 12, 1842, and as amended August 2, 1843, stated that the complainants, a corporation in the city of New York, having banking and other powers, in July, 1838, being in want of a considerable sum of money, to enable them to discharge its liabilities and their bank to resume specie payments, opened a negotiation with Mr. Duer, the vice president of 'The American Life Insurance and Trust Company, a corporation created by the state of Maryland, but then and still having an office or agency in the city of New York, and then professing to loan money in that city ; and on learning that the Trust Company would loan the required amount, the complainants proposed to secure its payment by their bonds, secured by real estate in the city of New York, worth double the amount borrowed.

That after much negotiation, it was finally arranged and agreed between the complainants and the Trust Company by its vice president, that the Trust Company should loan to the complainants two hundred and fifty thousand dollars for a term of years, upon the following terms and conditions, viz : The complainants should give their bills of credit or bonds, as they were called, for fifty thousand pounds sterling, payable in London to the order of Mr. Duer, bearing interest at six per cent. per annum, payable half-yearly, on the fifteenth days of July and January, until paid, and calculated at five dollars to the pound sterling ; £10,000 being payable July 15, 1842 ; £10,000, July 15, 1843 ; £10,000, July 15, 1844 ; and £20,000, July 15, 1845 ; and that the same should be chargeable upon and secured by the complainants' real estate in the city of New York, worth double the amount. And further, that the com-

(a) The reporter has been induced by the frequent occurrence of defences on the ground of usury, the importance of the questions discussed in this case, and the magnitude of the interests involved ; to deviate from his usual practice, and insert in full the arguments of the counsel on the principal points.

plainants, instead of actually paying its bills of credit or bonds in London, and the interest thereon at six per cent., should pay the bills of credit or bonds to the Trust Company in New York, at the rate of five dollars to the pound sterling, and interest thereupon at seven per cent. half-yearly, and to make such payments at least forty days previous to the time when the same should fall due in London. The complainants being in effect required to pay \$250,000 to the Trust Company, at seven per cent. interest, half-yearly, in New York, at least forty days before the times interest and principal were payable in London. And in addition to, and forming a part of the terms of the loan from the Trust Company, the complainants were to allow a deduction of one per cent. on the nominal amount of \$250,000; which as represented, was to enure to the private benefit of Mr. Duer, and to be paid to him upon the consummation of the agreement. And also in addition to, and forming a part of the terms of the loan, it was agreed that the complainants should guaranty to Mr. Duer, that upon such consummation, (by which they would be enabled to resume specie payments,) he might and could purchase in the market, one thousand shares of their capital stock, at seventy per cent. on its par value; that being the reduced value of the stock at the time of making the contract; the object and intention of the guaranty, being to secure to Mr. Duer the advantage of purchasing the stock at the then price, in case the contract were carried out and their resumption of specie payments should increase the market value of the stock; and to secure him against the rise of the stock, which the purchase of so large an amount might create in the market. Which guaranty, the parties then justly estimated might produce a loss to the complainants exceeding five thousand dollars, and a profit to Mr. Duer of ten thousand dollars.

That the Trust Company, instead of actually loaning to the complainants upon the securities, the sum of two hundred and fifty thousand dollars, the nominal amount was agreed to be further reduced four per cent., and then instead of money, that the complainants should take and accept, in lieu thereof, certain certificates or obligations, made and given by the Trust Company, to the amount of twenty-four thousand pounds, adding

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thereto an interest of five per cent. per annum, and made payable in London, (as stated in the certificates,) part payable 15th July, 1839, and the remainder 1st October, 1839, and twenty-four thousand pounds, bearing an interest of five per cent. per annum, payable in London, in two years from the fifteenth day of July, 1838; such certificates issued in different sums, but generally for about the sum of five hundred pounds sterling.

That the gross nominal amount of the certificates agreed to be taken in lieu of the money, was forty-eight thousand pounds sterling, or allowing five dollars to the pound, the same amounted to two hundred and forty thousand dollars; and that the value of the certificates in market at the time of the contract, well known to both parties, did not exceed ninety per cent. of the nominal amount of the same, and could, under no circumstances, be made to produce more than \$228,000, out of their nominal amount of \$240,000, from which product was to be taken the two thousand five hundred dollars, allowed to Mr. Duer, for commissions, and five thousand dollars for the guaranty of the stock, as before stated, and the amount of proceeds would be reduced to about \$220,000. An extract from the books of the complainants was annexed to the bill, showing the amounts, dates, and minute particulars of the transaction.

The bill further stated, that the moneys designed to be realized and actually agreed to be loaned to the complainants by the Trust Company, after deducting the sum required by, and represented to be for Mr. Duer, did not exceed the sum of \$220,000, and for which the Trust Company and Mr. Duer, the vice president thereof, as such, and as represented, on his own account, required the complainants, as the security for such proceeds of \$220,000, and with the usurious intent of obtaining more than seven per cent. per annum for the loan of the money to the amount of such proceeds, to give their bills of credit or bonds, for the gross amount of fifty thousand pounds sterling, equal to \$250,000, secured by real estate, worth double the value thereof.

That with a view of more securely avoiding the appearance of usury, it was further agreed by the Trust Company and the complainants, and executed by Mr. Duer the vice president, that instead of giving a mortgage in form, as the collateral security

to the Trust Company, a deed in trust of the real estate should be made by the complainants, conveying the same to Mr. Duer, and Morris Robinson, and Abraham Crist, for the purpose of securing the payment of the bills of credit or bonds.

That in consummation of the usurious agreement, the complainants executed and delivered to the Trust Company, their bills of credit or bonds, as they were called, according to the terms of the agreement as before stated. And they also duly executed and delivered an indenture tripartite, between the complainants of the first part, and the Trust Company of the second part, and Morris Robinson, John Duer, and Abraham Crist, of the third part, dated the 24th day of July, 1838, and which deed or indenture was duly executed by the respective parties thereto. The indenture recited that the complainants had determined to issue their sterling bills of credit, for fifty thousand pounds sterling, payable in London, at the times and in the manner before stated; the payment of such bills of credit, being specially charged on the real estate of the complainants therein mentioned. And the indenture also recited, that The American Life Insurance and Trust Company had agreed to guaranty the payment of such bills of credit and interest, as they should respectively fall due and become payable. And it was also recited, that it had been understood, and was thereby agreed, that the Trust Company should pay the bills of credit and the interest thereon, in London, as they should respectively fall due and become payable, without any charge for remittance, difference of exchange, commission, or otherwise, the complainants agreeing to pay the Trust Company the interest upon the bills of credit, at the rate of seven per cent. per annum, half-yearly, valuing each pound sterling of the principal at the rate of five dollars, at least forty days previous to the time when the same should fall due and become payable in London; and also agreeing to pay to the Trust Company the amount of the bills of credit, at the rate of five dollars for each pound sterling, at least forty days previous to the time the same should respectively fall due, and become payable in London. And further, the complainants, by the indenture tripartite, as therein stated, for the purpose of securing the payment of the bills of credit, and the interest, before mentioned, and in

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consideration of the sum of one dollar, to them in hand paid by the party of the third part, granted, bargained, aliened, released, conveyed and confirmed to the parties of the third part, and to the survivor or survivors of them, all the several pieces and parcels of land, set forth and described in such indenture tripartite, situate on and near the East River, between Sixth and Eleventh streets, in the Eleventh Ward of the city of New York—to have and to hold the premises, so therein described, to the parties of the third part, and to the survivor or survivors of them, in trust, for the purpose of satisfying the bills of credit, and interest thereon, and upon the following condition, viz: In case the complainants should fail to pay to the Trust Company the bills of credit, before mentioned, or the principal thereof, in the manner before stated, then it should be lawful for the parties of the third part, and the survivor or survivors of them, and it was made their duty, either to lease, mortgage or sell the premises, or any part thereof, and out of the avails thereof, to pay the Trust Company the interest upon the bills of credit, and the principal, in the manner before mentioned. And upon the further trust, that in case the Trust Company should at any time thereafter, fail to pay the interest upon the bills of credit, or the principal in London, as the same should severally fall due and become payable, then it should be lawful for the complainants to pay the bills of credit, and the interest thereon as stated, to the parties of the third part, or to the survivor or survivors of them, who should then provide for the payment of the same, with the interest thereon, as the same became due; and in case the complainants and the Trust Company should both fail to pay the bills of credit, and the interest thereon, in manner and form, as was therein before stated, respectively to be done, then it should be lawful for the parties of the third part, and the survivor or survivors of them, and it was made their duty, to lease, mortgage or sell the premises, or any part thereof, and out of the avails to pay the bills of credit, and the interest thereon, as they severally became due and payable. And it was also mutually understood and agreed, that in the execution of the trusts created by the deed, the parties of the third part, should be entitled to receive and

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reimburse themselves all costs and charges in the premises, and retain reasonable compensation for their services.

The bill further stated that James Morrison of the city of London, was the holder of the bills of credit, or bonds so given by the complainants, to £47,800 sterling, or thereabouts, and that the residue of £2200 sterling, was in the hands of some person or persons in London or elsewhere, in foreign parts, wholly unknown to the complainants. That the premises described in the deed of trust, were at the date of the same, of the value, and well worth five hundred thousand dollars, and were free of all incumbrances, and that no other consideration whatever, was received by the complainants, or moved from the other parties thereto, than the usurious consideration before set forth.

That the certificates were in pursuance of the contract, received by the complainants from the Trust Company, amounting in the whole to the nominal sum of £48,000 sterling, or \$240,000, at five dollars to the pound sterling, and which was the only amount, and the only manner in which the \$250,000 was loaned to the complainants by the Trust Company; and Mr. Duer, when so delivering the certificates, took and retained one of them amounting to £500, or \$2500, as and for the one per cent. for his commissions, in pursuance of the contract, of which the Trust Company had notice, and the same was also well known to Messrs. Robinson and Crist, the other trustees. That the \$240,000, of certificates, were not worth in market, (and so all the parties knew,) exceeding \$228,000, and deducting the \$2500, paid to Mr. Duer, not worth much over \$225,000. That the complainants actually paid in addition, a loss of over \$5000, on the guaranty of the one thousand shares of their stock, to Mr. Duer, at the rate of seventy per cent. upon the par value thereof; and they charge, that in fact, the proceeds of the certificates, after making the deductions specified, did not equal \$220,000; and this result was certain, and well known to all the parties at the time of contracting the loan, and which was usuriously exacted on the one side, and yielded to on the part of the complainants upon the other side, as the only means of obtaining the loan from the Trust Company.

The bill further charged that the bills of credit or bonds, so

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given by the complainants, and the deed of trust, so given to secure the payment of the same, were so given upon the usurious contract before stated, and upon no other consideration whatever; and that the contract was, and is, usurious and void; and that the said certificates or bonds, and the deed of trust being founded upon such usurious agreement, in violation of the statute regulating the interest of money, are void.

That the Trust company threaten to proceed and collect, and enforce payment of the interest and principal, due and growing due upon the usurious agreement stated in the bill, by requiring the trustees to take possession of the premises conveyed to them, requiring the tenants of the complainants to attorn to and pay the rents to them. And that the trustees have actually issued and caused to be delivered to the complainants' tenants, notices of the trust deed, and of their title to the rents, and forbidding the tenants to pay the same to the complainants, and requiring payment to be made to the trustees. Which notices were dated April 26, 1842.

That the trustees intend to assume the direction and control of the complainants' property, conveyed to them in trust, and continue to interfere with and embarrass the complainants in the enjoyment of their property, and the rents and profits thereof, and by their threats and interference, produce irreparable injury to the complainants.

The bill prayed that the conveyance in trust, and bills of credit or bonds might be declared void, and that the same be delivered up and cancelled, and that the trustees might release to the complainants the premises conveyed to them, and that the Trust Company, and the trustees, and James Morrison, might be restrained from commencing or prosecuting any suit or proceeding whatever, to obtain the premises described in the conveyance in trust, or the possession thereof, and from collecting and receiving the rents of the premises, and from meddling, or interfering with the said premises, or any tenants thereof, and from hindering or interfering with the complainants in the enjoyment of the premises, or the collection of the rents of the same; and for general relief.

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Duer and Morris Robinson, united in an answer to the bill, in which they set forth, that the complainants applied in March or April, 1838, to the Trust Company, through Mr. Duer, to aid their bank in resuming specie payment. The negotiation was carried on several weeks, and on the 9th of May resulted in an agreement, by which the complainants were to issue their bills of credit for £50,000 sterling, as stated in the bill, and pay them in New York as also stated; the Trust Company were to guaranty the payment of such bills of credit and interest, were to take upon themselves all the risks of remittances, fluctuations of exchange, and all other risks attending the transmission of the funds; and in order to cover and protect the Trust Company from their responsibility in the guaranty of the bills of credit and their assumption of such risks, and as a commission and compensation for their trouble in the agency, and as a protection to those who might become purchasers or holders of the bills of credit; the complainants were to secure the payment of the same by a mortgage or pledge of their real estate; and the pound sterling was to be calculated at five dollars. It was further agreed that the Trust Company should purchase the bills of credit, and in payment, should issue to the complainants, the certificates of deposit of the Trust Company, for £48,000 sterling, with such interest and redeemable at the time stated in the bill. And the £2000 sterling difference between the bills of credit and the certificates of deposit, was a part of the consideration of the extraordinary risks assumed by the Trust Company in remitting nearly \$500,000, from New York to London, exclusive of the half yearly remittances of interest; which risk embraced not only the solvency of drawers of bills, by which the funds were to be remitted, but the rate of exchange at the several times when made, the solvency and fidelity of agents in London, and the other hazards attendant upon a transaction of such magnitude and duration.

The answer further stated, that the price of the certificates or of the bills of credit, entered in no way into the transaction, as it was but an exchange of securities. That the sterling certificates of the Trust Company, were not made for the New York market, or ever sold there; but similar certificates of theirs were

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at that time selling at par in London. The agreement as stated, was consummated by the issue of the certificates on the one hand, and the bills of credit on the other, with the deed of trust set forth in the bill; and this was the whole agreement between the parties. The answer denied that any stipulation for an allowance or deduction of one per cent. to Mr. Duer, or for a transfer of stock of the complainants, formed any part of the negotiation or agreement, or entered into the same directly or indirectly. The title to the complainants property conveyed as security, was derived from various sources; the examination of the titles was long, laborious and unusually complex; and for this service, his opinion on the titles, preparing the securities, and the responsibility incurred by him therein, the complainants paid to Mr. Duer, who was the counsel of the Trust Company, one of the latter's certificates of deposit, for £500, as a counsel fee. That Mr Duer frequently fixed one per cent. for his counsel fee in small transactions, and in all it made a fair proportion, having reference to the transaction, the labor and the responsibility. The fee was not paid to him as an officer of the Trust Company, and formed no part of the contract with them. The party for whose benefit the titles were examined, always paid their counsel, and the complainants well understood this custom.

The answer denied the arrangement or contract, stated in the bill, as to guaranteeing to Mr. Duer the purchase of the complainants' stock. It set forth that during the negotiation, or after its conclusion, the complainants' president, Mr. Holmes, offered to sell to Mr. Duer one thousand shares of such stock, at seventy-five per cent., which was then above the market price, and upon consulting some friends, he agreed to accept it. He believed it belonged to Holmes, or to him with other directors of the complainants' bank. When Mr. Duer, about the 8th of June, 1838, requested Holmes to transfer the stock, he was told that Russell Stebbins, another director, from whom Holmes said he expected the shares, would not transfer them without receiving their par value, and that the difference must be provided for in some way. Thereupon Mr. Duer paid to Stebbins' firm \$30,000, being the par value of the thousand shares, and the difference between that and the price agreed upon, was paid by Holmes in a post

note of the complainants for \$7334 37, with interest; which note was given to the Trust Company, who had advanced the money for purchasing the stock. Mr. Duer did not know or understand how Holmes obtained the post note, nor whether its payment would be a loss to the complainants. The answer denied that the Trust Company had any concern or interest in the same; or that the complainants had, to the defendant's knowledge or information. One half of this stock was transferred to three persons, who were directors in the Trust Company, and became directors in the complainants' bank; Mr. Duer retained four hundred shares, and one hundred went to another person connected with the Trust Company.

The answer denied that any loan was agreed to be made by the Trust Company to the complainants, or was made, or any other negotiation entered into than that set forth in the answer. And it denied that the agreement was corrupt and usurious, in the intention of the parties, or in contemplation of law. The trust deed was adopted as a convenient and appropriate form, and for no other purpose. The premises conveyed, were at the time estimated to be worth \$500,000, but they have greatly declined in value, and it was doubtful whether they were a sufficient security for the \$250,000. The answer further stated, that the bills of credit issued by the complainants, were transmitted to London for sale, with the Trust Company's guaranty, and £2200 sterling, were sold from October, 1838, to December, 1839, producing £2146 10s. 6d. sterling, net to the Trust Company. The price became so low, that further sales were deemed inexpedient, and in January, 1840, the whole residue, £47,800, was conveyed and assigned to James Morrison, of London, as security for £44,500 sterling, advanced by him to the Trust Company on their bonds and the bills of credit. The Trust Company has paid to the holders of the same, £4000 sterling of the interest which has accrued thereon since January 15th, 1841, no part of which interest has been paid by the complainants. The answer denied that the result of the sale of the certificates of deposit by the latter, was certain and well known to the parties when they contracted; or that there was any thing usuri-

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ously exacted on the one side, and yielded to on the other, in the arrangement.

The trustees acted in discharge of their duty, in proceeding to control the possession and the rents of the property conveyed to them.

The answer of James Morrison, did not differ essentially from that of the other defendants, except that he had no knowledge or information as to the consideration on which the complainants executed their bills of credit, and the conveyance in trust. It stated that he was the holder of one hundred and thirty-three of those bills, amounting to £47,800 sterling, which he received, believing them to be valid and available securities, and upon sufficient and lawful consideration. That he took the same in the usual course of business, for a valuable consideration, before they were due, and is entitled to payment thereof, and to the security of the premises conveyed in trust. In January, 1840, the American Trust Company owed to him £45,288 13s. 9d. sterling, for which he then held those bills of credit as a security. The company paid to him £5000, and assigned to him £44,500 of the bills of credit, in discharge, when paid, of £40,118 16s. 7d., which he accepted as the balance of such debt. The company was then able to pay him, and he would have enforced payment in cash, if he had not relied in full faith on the bills of credit so transferred.

The answer of Abraham Crist, was of a neutral character. He was the solicitor and counsel of the complainants when the trust deed was executed ; but had ceased to act in that capacity.

Replications to the respective answers were filed, and testimony taken on both sides.

Obadiah Holmes, on the part of the complainants, testified that he was one of their directors in 1838, when the bank, after applying in vain to the city banks for aid, attempted to obtain a loan in order to liquidate the demands against them, and thus take their property out of the hands of a receiver, and dissolve an injunction then outstanding against them. He was afterwards their president. The directors appointed the witness with R. Stebbins and E. D. Comstock, a committee to effect such loan. The witness called on Mr. Duer, the vice president of the Ameri-

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can Trust Company, and opened to him the subject of a loan. It resulted in the complainants procuring a loan from them of \$250,000, in their certificates of deposit for £48,000, payable in London, for which the former gave their bonds for \$250,000, payable in London, secured by the deed of trust. In the course of the conversation with Mr. Duer, the witness told him that the complainants had, as he supposed, the control of one thousand shares of their stock, which the committee would sell to him and his friends, at a little below the then market price, and would permit them to nominate directors in the complainants' institution. Mr. D. then remarked, that he should require one per cent., for himself individually, and for commissions, counsel fees, &c. ; all of which was acquiesced in by both parties, and finally consummated. The witness stated to Mr. D., that the market price of the stock was greatly below its intrinsic value, particularly after a loan should be made; and so it proved, as the stock went up to par soon after the loan was made. Mr. D. did not make it a condition, that the stock should be furnished, but the committee felt obligated to furnish it after the loan was made. The witness's object, was to get him interested in the complainants' corporation, so that he might make money and facilitate the committee's arrangement for the benefit of the two companies. The witness remonstrated with Mr. D., in regard to the allowance of four per cent. discount on the loan, and offered two and one-half per cent. ; but he insisted on the four per cent., in consideration of the Trust Company's indorsing and becoming liable on the complainants' bonds. Time was taken by the witness for consultation with the others of the committee and the directors. The others objected particularly to the arrangement relative to the thousand shares of stock, but on reflection, they ultimately conceded it. (The witness then stated the consummation of the agreement, as it appeared in the pleadings.) The property conveyed was valued by sworn appraisers at a little over \$500,000. The witness believed he could realize in London, either par, or within one or two per cent. of it, on the Trust Company's certificates. He knew a house where he could probably get the money for them, when he commenced negotiating, and Mr. D. concurred with him in that belief. Mr. D. went

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with the witness to that house to ascertain, and on the object being explained, they were assured that an advance of ninety per cent. would be made, and the certificates forwarded by the house to London for sale. The same house subsequently made advances on them accordingly. The loss sustained by the bank on the certificates was about \$20,000. On receiving the balance of the certificates, the witness handed to Mr. D. one of £500, in accordance with their agreement. The complainants caused a thousand shares of the stock to be purchased and delivered to Mr. D., he paying for it according to the understanding, which was about 74 or 75 per cent. This quantity of stock was hypothecated to the complainants, and the committee supposed the parties interested would let it go at its then market price, about 75 per cent. ; but while negotiating for it, the stock advanced nearly to par, the parties declined to let it go, and the complainants had to buy it in market as well as they could. They had to pay over \$7000 more for it, than the price agreed with Mr. D. It was the understanding that Mr. D. was to examine the title and prepare the writings, but Mr. Crist, as the witness believed, performed those services.

On his cross examination, the witness stated that the injunction and receiver had been on the complainants about a year, and were in the first instance obtained on the application of their directors. They did not sell off the real estate, because of the great commercial depression, which they thought would cause a sacrifice.

When the witness first applied to Mr. D., he did not suppose the Trust Company had the money to loan to such an extent as he wanted. He proposed to deposit securities with the Trust Company, and a mortgage on the real estate, upon which the latter should issue their certificates of deposit. Mr. D. proposed the sterling bonds payable in London, and the deed of trust. It was the second or third interview, when he said he should expect one per cent., at the same time and after the terms of the loan were mainly agreed upon. It was a charge for himself as a counsel fee, and for his trouble in carrying out the affair. One of the committee proposed to him at the first interview, the sale to him of the thousand shares of stock. This was intended for his private benefit, and the witness did not then suppose the loss

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would be much to the complainants. It was offered to him at three or four per cent. below its market price. The loss to them was occasioned by the rise in value, and their being unable to control the stock as before mentioned. The committee when they proposed this, did not suppose the securities they were to give would be illegal or invalid. Mr. D. proposed that their bills of credit should be guarantied by the Trust Company, to which they made no objection.

The witness had learned from London, and so told Mr. D. during the negotiation, that the certificates would not bring quite par there. Since June, 1838, when the bank resumed payment, to November, 1844, exchange on London has ranged in New York from five to ten and a half per cent.

Russell Stebbins, a witness for the complainants, testified that he was a director from January, 1830, till April, 1845, and their president from February, 1841, to January, 1845.

That the committee to negotiate a loan of \$250,000, to \$300,000, was appointed by the board of directors on the 9th of May, 1838, and he produced a copy of the minutes of the board on that occasion. Mr. Holmes conducted the negotiation and reported to the others, when witness went with him to Mr. Duer. The witness objected to Mr. D., to the rate of four per cent. charged on the loan, to the one per cent. commission and to the thousand shares of stock, and as to the latter told him the complainants had no right to sell it in that way. Mr. D. stated that he could not or would not take less, and intimated by his manner, and as witness believed by words, that if they did not choose to take it, there was no harm done. Mr. Holmes and the witness then left, but they acceded to the terms.

(These were stated substantially as by Holmes; except that this witness understood the stock was to be furnished at its then current rate, between 70 and 75 per cent.)

The loss on the stock was adjusted thus: The Trust Company furnished the \$30,000, which was necessary to buy it, and then a due bill of the committee payable to that company, was given to Mr. Duer, for the difference between that sum and the price at which he was to have the stock furnished. The due bill was dated June 8th, 1838, and it was afterwards withdrawn

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and a post note of the complainants substituted, dated November 20, 1838, for \$7847 87, which included a year's interest. The receipt at the foot of the due bill, was given by the secretary of the Trust Company. The market price of the stock of the Dry Dock Company was 73 per cent. on the 21st of April, 1838, 73 to 73½ on the 12th of May, 74 on the 15th of May, 78 on the 17th, 80 to 81 on the 18th of May; and from thence it continued advancing till the 6th of June, when it sold for 97, on the 7th at 99, and on the 8th of June, at par. Mr. Crist examined the title of the lands conveyed, and prepared the abstract, for which the complainants paid him \$200. He also drew the trust deed, for which they paid him \$50.

On his cross examination, the witness stated that he was a large stock-holder in the Dry Dock Bank, when it suspended, and when it prepared to resume specie payment. When the complainants made their application, it was in contemplation to obtain money, to pay off their debts; yet they wanted to obtain credit, and were willing to pledge their property, to raise the means to pay their debts. The last sale of their stock in market prior to April, 1838, was on the 10th of January, at 70 per cent. The thousand shares of stock, were intended for the private benefit of Mr. Duer, but it was a part of the general arrangement, as the witness understood it. It was understood by both parties, that the certificates of deposit were to be sent to London, for negotiation, but the witness did not know that the bonds of the complainants were positively to be sent there. Mr. Duer was counsel for the Trust Company, in respect of the abstracts of title and the trust deed.

On the part of the defendants, Mr. Duer was examined as a witness, and testified in substance to the facts set forth in the answer of the American Life Insurance and Trust Company. He also stated that the negotiation was commenced by Mr. Holmes the last of March, 1838, and he first applied to ascertain on what terms the Trust Company would guaranty the Dry Dock Bank's bills, of credit and negotiate them in London. This could not be done, and it was then proposed that the Trust Company should become the purchasers of the bills of credit to be issued by the bank, by exchanging therefor their own securities,

and should assume upon themselves the payment in London of the bank's bills of credit, and the payment of the latter by the bank, to be secured by a conveyance in trust of the real estate of the bank. A long time was consumed in the settlement of the details of the proposition. There was no proposition at any time, for a loan of money by the Trust Company to the complainants. It was well known by the parties, that the former could not have advanced the amount required in cash. The complainants knew that the Trust Company intended to sell their bills of credit. Hence those were made payable in London; and the certificates of deposit were made payable there, because the complainants expected to raise funds there on the credit of the Trust Company. The provision for their paying five dollars in New York, for every pound sterling, forty days before the time of payment in London, was upon the consideration that the Trust Company guaranteed and undertook to pay absolutely in London, the complainants bills of credit. Such payment was to be provided for either in funds there with an agent, or a sufficient credit to meet it. To provide funds, bills of exchange were to be purchased and remitted. The agent would receive a commission for his services, and the Trust Company risked his solvency and honesty, as well as the goodness of the bills of exchange used for remittance, and the chance of an advance in the price of exchange. The rate of five dollars to the pound, was fixed upon as a part of the compensation for these risks and expenses. The difference of £2000, between the amount of the certificates and the bills of credit, was intended as a compensation to the Trust Company for the services they were to perform, and the risks they undertook, in the transaction.

The bills of credit were all indorsed with an absolute guaranty of payment of both interest and principal, by the Trust Company.

The proposition for the sale of one thousand shares of stock, was made to the witness individually; and as he understood it, the stock was owned by Mr. Holmes and others, in their own right. The price was slightly above the market when it was offered.

The price was seventy per cent. at which the stock was agreed to be sold. When the bargain was consummated, the witness agreed to give several per cent. more than the price at which it

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was offered; and did give something more than 75 per cent. There was no condition or stipulation about this stock in the agreement between the two corporations. It was a private matter, resting upon the honor of Mr. Holmes and those for whom he acted. The allowance of one per cent. to the witness, was paid to him as a counsel fee for examining and certifying the title to the lands conveyed in trust, and settling the form of the securities that were to be executed. The Trust Company had no interest in the allowance, and derived no benefit from it; and it was not made a condition of the loan. The witness examined the abstracts of the titles, the searches, and when necessary the original deeds. The investigation was very laborious, and some weeks elapsed before it was completed.

James G. King, for the defendants, testified that he had been a banker for twenty years, as a member of the firm of Prime, Ward & King, and was conversant with dealings in exchange between the United States and London. When employed by a principal in New York, to make a remittance to London by bills of exchange, and a payment to his creditor there, the charges would be—for purchasing the bills, one-fourth of one per cent., for making the remittance under guaranty, which including purchasing, one per cent., banker's commission in London, half of one per cent., and the interest or discount in London, as might be agreed upon. The English sovereign in 1838, represented the pound sterling, and was by law a legal tender in the United States, at four dollars and eighty-seven cents. The charges on remitting in sovereigns from New York to England are; for purchasing, shipping, and effecting insurance, a commission of one per cent.; freight, three-eighths to one-half of one per cent.; insurance, one-half of one per cent.; receiving in London, converting and paying, a commission of one per cent. These commissions, in a continuous course of reciprocal business, are now usually reduced one-half. In order to give five dollars to the pound sterling, the rate of exchange would be twelve and one-half per cent. premium, without any commissions, for sixty day bills, which is the usual time after sight, at which bills remitted to England are drawn. The market price of sovereigns in

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New York is generally a little higher than the value as fixed by law ; the difference sometimes rises to a half per cent.

Samuel Jaudon, for the defendants, testified that he was conversant with dealings in exchange between England and the United States for twelve years ; first while cashier of the Bank of the United States, for four years as a banker in London, and since in New York. The ordinary commission for purchasing and forwarding bills of exchange, is one-half of one per cent., including the correspondence ; for guaranty or indorsing the bills, one per cent. ; the banker's commission in London, for paying interest or dividends in small sums, is one per cent. The discount on the bills remitted, depends on the time they have to run, and the state of the money market. The rate varies from two and one-half per cent. to six per cent. per annum. The sovereign in 1838, was of the value of four dollars, eighty-six cents, and one-tenth of a cent., according to the mint assay in the United States. To remit to England and pay in sovereigns, the charges would ordinarily be three per cent., viz : bullion broker for purchasing and packing, one quarter of one per cent. ; insurance and shipping charges, about three-fourths of one per cent. ; freight ordinarily, one-half of one per cent. ; commission here, the same ; commission in London, one per cent. The charges on remitting and paying interest in small sums, on a large number of notes in London, if put in funds in New York forty days before due there, including discount on the bills remitted, would ordinarily be three per cent. ; to which the market price of the bills should be added. The legal par of exchange between England and the United States, according to the laws of the latter, is nine and a half per cent. The three per cent. charges added, would make exactly five dollars to the pound sterling, that the remittance would cost. The legal rate of the pound sterling, has been altered since 1838, making it worth a little less than it was then. To remit in sovereigns and pay in London, being furnished here forty days before due there, the witness would require here five dollars, and six mills and 83-100ths of a mill.

James Brown, for the defendants, testified that he had been engaged about twenty years in buying and selling foreign exchange. His firm in New York is Brown, Brothers & Co. For

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remitting to London in bills of exchange, assuming the risk, and paying over there in dividends on notes varying from £100 to £800, and amounting to near £50,000; engaging in 1838 to do this; the charges would be, for purchasing, one-half to one per cent., probably half per cent., the amount being large; for remitting and guarantying, one per cent.; commission in London, one per cent.; discount at the rate of five per cent. per annum. The reduction in the value of the sovereign since 1838, has been about one-fourth of one per cent. To remit in sovereigns and pay dividends as before mentioned, the charges would be, for purchasing and remitting, including brokerage, one per cent., if in sums of \$5000 at a time; if \$10,000 or more, three-quarters of one per cent.; freight, one-quarter to three-eighths; insurance one-half of one per cent.; paying in London, one per cent.; and then the shipping charges, which would be a mere trifle on coin. The charge for accepting or indorsing paper at six months, without funds in hand, but with sufficient security, would be about two and one-half per cent. by those engaged in such business. To make a payment in London of £1000, due in forty days, on being furnished with specie funds here, the witness would charge from three and one half to three and three-fourths per cent. Stated separately, the cost of remitting and paying by bills, and by sovereigns is thus: By sovereigns, one-fourth to one-half per cent. premium for the coin, one-half to three-fourths for purchasing, one per cent. commission in London, one-fourth to three-eighths for freight, one-half to three-fourths for insurance; making from two and one-half to three and three-eighths per cent. By bills of exchange, one-half to three-fourths for purchasing, one per cent. for guaranty and remitting, commission in London one per cent., discount for the sixty-three days, 83-100ths per cent.; making from three 33-100ths to three 58-100ths per cent.

George Griswold, for the defendants, testified that he has been engaged in foreign commerce thirty-five years, and a portion of his business has been that of remitting and drawing on London. The ordinary charges for remitting in bills and paying dividends in London, in the manner before mentioned, are, for buying, one-fourth of one per cent.; for remitting and guarantying, one per

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cent. ; for paying over in London, one-half to one per cent. ; and to cash the bills in London, interest at five per cent. per annum. For a like operation in sovereigns, the charges would be, for brokerage in buying, one-half per cent. ; one-half to three-fourths for insurance, depending on its being in summer or winter ; freight, three-eighths to one-half ; commission in London, one-half to one per cent. ; and sundry petty charges for shipping and discharging. For accepting or indorsing negotiable bills at six months, without funds in hand, but with sufficient security for ultimate reimbursement, the usual charge would be two and one-half per cent.

The defendants, also read in evidence the act of the legislature of Maryland, incorporating the American Life Insurance and Trust Company, and the several acts amending and consolidating the same.

S. Sherwood, for the complainants.

I. The transaction set forth in the bill of complaint and admitted by the answers, originated in the application by the New York Dry Dock Company, to the American Life Insurance and Trust Company, for a loan. The form was devised by the latter, for the purpose of securing to themselves a greater profit than seven per cent. per annum, for the money which they should advance or pay to the complainants.

The whole object of the complainants was to obtain money, nothing short of which would enable them to resume. The certificates of deposit were received by them as cash. There was clearly a loan on one side, and a giving of security on the other. And the result of this gross usury, showing a loss to the complainants up to July, 1845, of \$63,563 73, beyond legal interest, awakened the concern of the stockholders, and induced them to come into this court, to settle the equities of the case, upon the law of the land. The answer seeks to justify it, first as a purchase, next as an exchange of securities, and lastly as to the deduction of four per cent., on the ground of the guaranty.

1. It was not a purchase. By their charter, the Trust Company could not guaranty, except bills and notes which they had previ-

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ously discounted or purchased, and which they then held. So a purchase in this case will not stand with the guaranty, provided for in the same contract. And the complainants could not sell their own bills of credit.

2. It was not an exchange of paper. That consists simply of passing the paper of the one to the other, without any other consideration. This was unlawful on the part of the complainants. (1 R. S. 589, § 1, subd. 7.)

3. It was not justifiable as a guaranty, because the Trust Company's charter prohibited it in such a case.

4. It was simply a *loan*. The complainants who were bound to resume specie payment, or lose their charter, applied to the Trust Company, who kept an office for the ostensible purpose of loaning money, explained its necessity and their situation and wants; asked for a loan of money, and offered improved real estate as the security. They applied there, because there only such large sums as \$250,000, or \$300,000, were to be had. They did not ask for an exchange of paper, or a guaranty, or for a purchase of their obligations. The Trust Company devised the form of the transaction, and pointed out how their certificates would produce the money. They all treated it as a loan, and so called it, and Mr. Duer does so still, except when placed on his guard and made to discriminate.

III. The contract between the parties, actually reserved a greater premium to the American Life Insurance and Trust Company, than seven per cent. per annum, and is therefore void.

1st. The 4 per cent. discount made upon the bonds or bills of credit of the complainants, on the giving of certificates of deposit at the rate of £96, for £100, was usurious and made the contract void.

This is excused by the extraordinary risk and hazard of transmitting the moneys to Great Britain, and disbursing them there. As to this excuse, the complainants were to pay in New York, and the contract was in every respect to be performed here. There was no risk or hazard about it. The Trust Company were to advance their money, (or their certificates, which is no worse for them,) to a solvent bank, in which their directors wanted and took stock, on abundant real estate security; and the four

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per cent. was simply for advancing the money. It is said the certificates were payable abroad on time, but it was by paying here five dollars for every pound sterling, which covered remittance, commissions and all charges; and would enable them to remit in coin, covered by insurance. The \$5, for £1, made the transaction equal to cash in London.

2d. The difference charged between the rate of five per cent. interest, on the Trust Company's certificates of deposit, and the seven per cent. interest, required to be paid on the complainants' bonds or bills of credit, made the transaction usurious.

3d. The sum of five dollars required to be paid by the complainants per pound sterling, made the transaction usurious.

4th. The allowance of one per cent. to the vice president of the American Life Insurance and Trust Company, was a condition of the loan, and made the transaction usurious.

A fair compensation for examining the title is allowable; and if \$250, or even \$500, had been charged, it would not have been so disproportionate as to be properly regarded as a contrivance for something else. It was a part of the agreement for the loan, objected to, but the borrower's necessities compelled them to yield.

5th. The agreement to deliver and the subsequent actual payment, of the difference in value of the 1000 shares of the Dry Dock Company's stock amounting to \$7334, made the transaction usurious.

This was thrown in as an inducement to the loan, was accepted and enforced, and made a part and condition of the transaction.

The stock was certain to go up on the resumption. The Trust Company's receipt on the post note given for the difference, shows it was their affair.

6th. So far as the complainants were concerned, the whole transaction was a *New York transaction*. They were to use the money here, and all their payments were by the terms of the agreement to be made here.

The expedient adopted to give it the aspect of a foreign transaction, was a mere device to cover the usury.

7th. The sacrifice of upwards of \$12,000, to which the com-

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plainants were compelled to submit, to obtain the money on the certificates of deposit rendered, the transaction further usurious and void.

IV. The contract and bills of credit sought to be secured by the deed of trust, were usurious and void, and the deed itself was therefore void.

V. The whole transaction was made by a foreign corporation, in violation of the laws of this state against illegal banking, and was therefore void.

If the transaction be as contended by the defendants, a mere exchange of the certificates of deposit of the Trust Company, for the bonds or bills of credit of the Dry Dock Bank, then such exchange is in violation of the statute in relation to monied corporations, and such bonds or bills and the deed of trust are void. (1 R. S. 597, § 1, subd. 7.)

VI. If the transaction by the American Life Insurance and Trust Company, was a guaranty of the bonds or bills of credit, of the complainants, then the contract was in violation of the charter of the Trust Company and void.

VII. The Court of Chancery can alone give adequate relief, and the complainants are entitled to the relief prayed for.

Upon the law of the case, we refer to *Seneca County Bank v. Schermerhorn*, (1 Denio, 136 ;) *Dunham v. Dey*, (13 Johns. 40, and 16 Johns. 367 ;) *Seymour v. Strong*, (4 Hill, 255 ;) *Crane v. Hubbell*, (7 Paige, 413 ;) *Coster v. Dilworth*, (4 Cowen, 299 ;) *Blydenburgh on Usury*, 49 to 56, and the cases cited. On the other side, they will refer to *Ketchum v. Barber*, (4 Hill, 226,) which was negotiable paper already in market ; *Rapelye v. Anderson*, which was an existing security, sold ; and *Suydam v. Westfall*, (4 Hill, 211,) which was a commission of two and one-half per cent. for accepting, sustained on the custom of merchants.(a)

(a) With their points, the complainants submitted a statement, showing the excess reserved, (on their assumption,) by the Trust Company, over seven per cent. per annum, taking the pound sterling at its maximum legal value here, i. e. the heaviest sovereigns, \$4 86 1-10.

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Ogden Hoffman, for all the defendants, except A. Crist.

I. The complainants are bound to prove the identical contract, which they set out and allege to be usurious.

This is a defence which receives little favor at law or in equity. The strictest proof is required, and technical objections are upheld, to prevent triumphs over good morals and good faith. The defence here is most unjustifiable. The complainants, insolvent in 1838, applied for relief to this Trust Company, then supposed to be rich, and their certificates intended to be negotiated, are now with innocent holders abroad.

1. The bill alleges the contract to be a loan of money or securities, on the condition that the complainants should guaranty the purchase of stock by Mr. Duer, at a certain rate. This is denied by the answers, and disproved by Mr. D. and by Holmes; and it is a fatal variance.

2. So the price at which the purchase was guaranteed was seventy per cent., according to the bill. The complainants' witnesses disprove that price, and show it was at the market value.

By this statement, brought down to 15th July, 1845, assuming the Trust Company to have paid their certificates, principal and five per cent. interest, as they fell due, and computing interest at seven per cent., on each payment from the time it was made; their advances and interest amounted to, . . . \$320,960 86
And the Dry Dock Company's payments on their bills of credit, if made according to their tenor, to July 15th, 1845, when the last of them become due, would have been, . . . 351,500 00

Excess, . . . \$30,539 14

To this the statement added as follows:

Reservation of one per cent. to the vice president, taken in one of the certificates of deposit for £500, due with five per cent. interest, on the 15th July, 1840, and interest thereon, . . .	3,524 22
Difference paid to the Trust Company on the 1000 shares of stock of the Dry Dock Company, \$7,334 37	
Interest to 15th July, 1845, . . . 3,646 61	10,980 98
Whole reservation in the contract, over and above seven per cent.,	\$45,044 34
Sacrifice Dry Dock Co. was compelled to submit to, on the certificates of deposit of the Trust Co., \$12,429 12	
Interest to July 15, 1845, . . . 6,090 27	18,519 39
Whole reservation, over and above seven per cent., . . .	\$63,563 73

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II. The transaction alleged as usurious, was a real exchange, or mutual sale of securities ; and was not, either in form or in substance, a loan of money or securities.

1. It was not a covert transaction, differing in its purpose from its apparent character.

2. It is essential to a loan, that there should be a return, either specifically of the same thing, or generically of a thing of the same kind. This was not a loan of credit ; but a sale or mutual exchange, and is not within the scope of the statute against usury.

The lender looks for funds to be returned to him. Here the transaction was complete and executed ; and when the bills of credit on one side, and the certificates of deposit on the other, were delivered, all privity of contract between the parties was at an end.

The securities might pass to the hands of others. There was no claim on either side for depreciation. It was like the sale of any chattel, or the exchange of an ox for a horse.

As to the payments being made here forty days in advance, the Trust Company became agents of the complainants to pay the amounts in London, in order to preserve their own credit as indorsers. Forty days was at that time the regular period for the transit of vessels across the Atlantic. This was purely a mercantile transaction, not a loan or a banker's. The complainants knew the Trust Company had no money to loan. If they supposed they were obtaining a loan, they were practising a stupendous fraud on the Trust Company, and on innocent holders in Europe, who should take their bills of credit in good faith.

III. If the transaction was a loan of credit, still the reservations did not render it usurious.

a 1. The reservation of seven per cent. interest on the Dry Dock bills, was no more than the legal interest on the amount of the certificates of The American Life Insurance and Trust Company.

2. If it were proper to look to the market value of the securities on each side, no difference is shown between them ; nor is it shown, that at the time of the transaction, the certificates were worth less than par, so as to constitute usury. (*Minturn v.*

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Farmers Loan and Trust Company, before V. C. McCoun ; *Dunham v. Dey*, before cited ; *Bullock v. Boyd*, 1 Hoff. Ch. R. 298 ; *Stall v. Elde*, 4 Bing. 81.)

b 1. The stipulation for converting sterling into federal money, at five dollars for the pound sterling, and paying forty days before payment in England, was no more than a fair conversion of the different currencies, taking into view the time the Dry Dock bills had to run.

2. If the object of the parties were really exchange or money in England, such difference of value, by mutual agreement or adjustment, is not a subject of usury. The evidence is uncontradicted, that the whole arrangement had reference actually to a sale of exchange in the London market.

c 1. As a loan of credit, some reservation may be made by the lender for the loan ; that reservation is lawful if it do not exceed a benefit of seven per cent. per annum, for the time of the credit loaned.

Here the certificates were loaned, one-half for one year, one-half for two years ; making ten and one-half per cent. on the whole ; the reservation was only four per cent.

2. It was part of the agreement, that the American Life Insurance and Trust Company should guaranty and remit the principal and interest of the Dry Dock bills ; for this guaranty they were entitled to the four per cent.

3. The American Life Insurance and Trust Company, in the transaction, became liable to provide exchange in England, both for their own certificates, and for the Dry Dock Company's ; the conversion of sterling into federal money, at five dollars to the pound sterling, on the Dry Dock Company bills, was a compensation of the remittance on one part only. The providing for their own certificates in England, was worth three per cent. ; the remaining part of the four per cent. reserved, was less than a reasonable charge for the loan of credit, and service in such remittance.

Suppose both set of securities had been payable without interest, and the Trust Company had taken seven per cent. from the complainants, it would not have constituted usury.

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The two per cent. difference in the rate of interest, and four per cent. commission, made only six in all ; less than legal interest. But it was not six per cent. a year, for the bills of credit run seven or eight years before they all matured, while their whole advance was to be made in two years. Besides this, they incurred all the risk, liability and charges of remitting, which were then justly deemed very onerous. The country was in a perilous financial condition. There was no confidence ; every thing was uncertain.

It is not true that the certificates were depreciated or that any sacrifice was expected. If they had been twenty per cent. below par, it would make no difference. The Trust Company were bound to pay their whole face. (*Bank of the United States v. Waggoner*, 9 Peters, 373, 378 ; *Andrews v. Pond*, 13 *ibid.* 65.)

IV. The advantages to Mr. Duer in the arrangement do not render it usurious, and cannot be taken into view.

1. The allowance of one per cent. for commission and counsel fee, was a matter of mutual agreement, not intended covertly as interest, or a reservation to the lender of any thing. (*Barretto v. Snowden*, 5 Wend. 135 ; *Little v. Barber*, 1 Hoff. Ch. R. 408.)

The court cannot say it was unreasonable between the parties. A charge of \$25, on examining a title on a loan of \$500, will be deemed reasonable. Yet it is five per cent. The responsibility is increased with the magnitude of the transaction. Here it was very large, the reputation of the counsel was involved, and he was responsible to every one who took one of the bills of credit, for the sufficiency of the title and the validity of the trust deed.

2. In relation to the stipulation respecting the purchase of stock, it not only was not for the benefit of the American Life Insurance and Trust Company, but when made, it was not understood to impart any loss to the Dry Dock Company. Its subsequently turning out otherwise, cannot make usury.

3. It is clear from the proof on both parts, that the allowance to Mr. Duer, and the guaranty of the stock purchase, were for the benefit of Mr. Duer exclusively of any interest therein directly or indirectly, on behalf of the American Life Insurance and Trust Company : it is therefore not within either the words

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or the spirit of the statute of usury, which rests on a reservation or taking by the lender.

The whole thing was uncertain and contingent. The stock might rise to par, and it might fall to forty per cent. No usury can be founded upon it. (*Lloyd v. Scott*, 4 Peters, 227; *Fellows v. The American Life Insurance and Trust Company*, before Assistant Vice-Chancellor Sandford.)

If Mr. D. had been mercenary and scheming, he would have bought what stock he wanted, before answering the complainants' proposal.

V. The securities on each side, were made with the intent to be disposed of in England, and the title of the defendant Morrison, arose under such disposal in London. They are not subject to be impeached by the imputation of usury, unless it be shown to be so by the English law. (*Com. Kentucky v. Bassford*, 6 Hill, 526.)

VI. The bill should be dismissed with costs. The plea set up by the complainants is most unjust, and inequitable, to those who relieved them from their disastrous situation, in the time of their greatest need.

Daniel Lord, also for the defendants.

I never heard of a case which equalled this, in the atrocity of its injustice. These complainants in May, 1837, procured an injunction, restraining themselves from paying their own debts. In 1838, they deemed it advisable to resume payment, and preserve their very valuable charter. The requisite money was not to be had in this country, and they applied to the American Trust Company to aid them in raising it abroad, proposing at first that the latter should guaranty their obligations. If that course had been adopted, and the Trust Company had charged them seven per cent., it would have been sustained by law. Then it was suggested that the Trust Company should discount their bills receivable. If we had done that, at a discount of fifty per cent., it would have been valid; but it would have taken the complainant's whole means.

Instead of this sacrifice, it was proposed that they should issue

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their bills of credit, which are post note, promissory notes on interest.

Those who were negotiating were fair men, and had no thought of usury. Any other supposition would convict the complainants of a design to swindle the London purchasers; for the bills of credit, show on their face, that it was contemplated to sell them in London, and two witnesses prove that intention. And in the result, Mr. Morrison discounted them, and probably his funds paid the certificates of deposit on which the complainants received the money.

The court has a right to look at the moral aspect of the case, and in one of such gross dishonesty, to see that the complainants are clearly within the law. It always looks with odium, on the defence of usury, and no inference in its support is to be indulged.

The parties are confined to the bill, the only ground of which is that of an *usurious loan*. They cannot proceed on the basis of a sale, or an exchange, or on any defect or violation of the Trust Company's charter.

I. (The counsel then examined at large, the defendants' first point, respecting the variance between the bill and the evidence; citing *Smith v. Bush*, 8 Johns. 84; *Fulton Bank v. Beach*, 1 Paige, 434; *Vroom v. Ditmars*, 4 *ibid.* 532; *New Orleans Gas Company v. Dudley*, 8 *ibid.* 452; *Suydam v. Bartle*, 10 *ibid.* 94; *Tate v. Wiggins*, 3 T. R. 538. In conclusion, he proceeded;)

The allegation that the thousand shares were to be furnished at seventy per cent., is sworn in the bill to be a part of the agreement, and a condition annexed to it. They have sworn this averment into the very heart of the case, and they cannot get rid of it. It will be most righteous and poetic justice, if they should fail on such a ground as this variance.

Next there was no usury. There was no application for a loan. The bills of credit were intended as a deposit with the Trust Company, and on that the certificates were issued. The bills were valued as money, on the basis that they were equivalent to such money, or that so much could be raised out of them. On both sides it was expected the money would be raised in the Eng-

lish market. There was no device about the matter. It was just what the papers stated it to be, and all regarded it as legal then. Such a deposit was legal, and was similar to a deposit of bank notes, and an issue of certificates.

II. (See the point, *ante*, page 240.) The transaction was more properly a deposit than an exchange, but it comes to the same thing in law. If this were a purchase of bill for bill, there was no loan about it. When I lend my note or endorsement, I expect the borrower will pay it. If I exchange notes, and he is to make use of mine, but I am not to use his note; that is a loan. But where there is a mutual loan of notes, and each party expects to pay his own note; there is no loan. In the other case, neither could recover on the note he held. In the last, each can recover; both being valid business securities. Both parties are in want of money, and we exchange our notes. I sell his at six per cent. discount, and he sells mine at eight. There is no usury in that. So in this case, if there were a real business deposit of the bills of credit, and each party were to pay their own issue. I refer to *Rice v. Mather*, (3 Wend. 64;) and *Cameron v. Chappell*, (24 Wend. 94,) as to an exchange of notes.

The statute of usury only looks to a loan or forbearance; not to a sale or exchange. (*Rapalye v. Anderson*, 4 Hill, 472.) If this were not a loan, it is not within the statute. The honest purpose which could be accomplished, is to be looked to. The complainants may rather have intended violating the law against exchange of notes and securities, than to swindle the community.

III. (See the point at large, *ante*, page 240.) Let us treat the transaction as a loan. What did we loan? Our certificates for £48,000, payable from six months to two years. Take one of ours for £1000, and one of their bills for £1000. I exchange my note for £1000, bearing interest at five per cent., for A.'s note for £1000, with seven per cent. Or suppose both were without any interest. Can I not take any compensation for that? Not even a six-pence? And if, at the end of five years, that were nine pence over seven per cent., would that be usury? It is settled here, that *commission* may be taken on an exchange of notes. If the transaction be considered as a loan of money, then a commission making more than seven per cent., makes it usu-

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rious. If it be considered an exchange of notes, then such a charge is not usurious. *Ketchum v. Barber*, (4 Hill, 225,) proves that position, and is the law of this court. And see *Dunham v. Dey*, (2 J. C. R. 182;) *Fanning v. Dunham*, (5 *ibid.* 122;) 1 Hoff. Ch. R. 298. The statute has no limit short of seven per cent., and it never contemplated a loan of credit. Credit will not serve the terms of the law for payment.

If we lend certificates, with a view to go and buy them up, it is usury; but not if we exchange them.

Here both corporations had a right to issue the paper they did. The credit was a short one, and it was a real mercantile transaction. Was the reservation excessive? It was foreign money to be paid on both sides.

It cannot be said, that they took our certificates under par. The testimony does not prove the parties expected them to be so. They bore the English interest, five per cent. If worth par to them, was it not lawful for us to take seven per cent. for them? We are not liable if they chose to sell the certificates at five per cent. discount. This is so in any exchange of paper, and is so where the rate of interest on both sides is the same. We are to pay their full face; no matter how they sold.

If the price at which they sold is a test, then the value of their bills of credit is also a test. But it is not.

Now, as to the difference of four per cent. On an equation of payments, it makes about three per cent. per annum on the time our certificates had to run. If we add the one per cent. commission, it is still only four. The testimony shows it requires about three per cent. to take money in New York, and pay it in London. That is found in the five dollars to the pound sterling. What do we get for the three per cent. expense of remitting our payments to pay our certificates in London? We are to make both remittances. We are to defray the compensation of our broker there, for selling bills of exchange, paying out the money, &c., and we are to incur all the risk and liability. The contingencies of commerce come in view. Thus we have in this case a change in the value of gold coin by an act of Congress. Political events may affect the result. We are entitled to something for the use of our credit, the trouble and risk of sales, the

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making of the payments in London, and the like. Is there any thing left of the four per cent. ?

The interest of money is based partly on the inconvenience to the lender, and partly on the risk of its never being returned. Say these considerations are equal, then three and one-half per cent. is a proper charge for the mere risk of not having the amount returned. The charge here is very moderate for the use of our credit only. See *Manice v. The New York Dry Dock Company*, (3 Edw. 148.)

IV. In respect of the counsel fee to Mr. Duer, and the contract for the shares of the complainants' stock.

(The counsel examined these subjects at length, referring besides the cases cited by his associate, to *Holmes v. Williams*, 10 Paige, 326.)

V. The securities being made for disposal in England, and Mr. Morrison's title having originated there, they cannot be impeached for usury by the laws prevailing here. If the transaction were a loan, then it was such on both sides, and neither could maintain an action on the securities while they held them. No action could be brought upon them, until they were negotiated abroad. Therefore the English law governs the case. (*Chapman v. Robertson*, 6 Paige, 628.)

In conclusion, we trust the court will find the variance such as to render needless an investigation of the other points presented ; and thus will extinguish in the outset, this gross, atrocious, insolent iniquity.

George Wood, in reply.

The common subterfuges of the usurer in England, were a sale or a loan of credit. Our codifiers in framing the revised statutes, have specified these modes. The statute of usury is to be fairly and properly enforced. It is not to be construed, so as to eke out and aid the usurer, by catching at technical objections. The complainants are entitled to as much consideration, as any party coming for justice. Is this court going to evade the law ? The Chancellor in 3 Paige, was merely carrying out the prior rule in England, that the principal must be offered to obtain

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relief in equity. The legislature found that rank usury was stalking through the land, and was rapidly increasing. Then came the act of 1837, abolishing entirely the English rule referred to.

I. In one view of this case, the Dry Dock Bank were issuing circulating notes, payable abroad, and the Trust Company were their agents to pay them there, being furnished with the money here forty days in advance, and guarantying the notes to facilitate the operation. This is the aspect of the case on the trust deed.

In fact, as it is proved, it is one of gross usury. There was not a *direct* loan of money, nor an exchange of available paper. The certificates on the one side, and the bills or bonds on the other, were not previously available, but were concocted at the time. There are only two lights in which it can be viewed. It was either, 1. a loan of credit, secured by the bills and a mortgage; or, 2. an exchange of available paper.

I apply to a capitalist for a loan. He has not cash on hand, but he has credit which is equivalent, and offers his notes at six months or a year, on the security of my bond, and a trust deed. That is a loan, his credit is loaned, my bond is a mere security for his loan. It is not a loan to him. That is one case. Suppose then that two of us wanted money, and could use each other's credit, and we exchange our notes, which in each others hands is unavailable paper.

The question is, which was the transaction in this case? We say it was the first; a loan of credit to the complainants, and not an exchange of unavailable paper.

The first element of inquiry is, what did the parties want, and how did they come together? The Dry Dock Bank alone, wanted to borrow. They wanted to use their paper to get rid of their embarrassments. The Trust Company did not want to borrow, they wanted no money, made no application. Look at their respective proceedings. The bank had been about, to all the other banks in the city, and in vain. The *want* was all on their part. And what did they want? Not this wind, this chouse in action; they wanted the substantial stuff. Mr. Duer understood that, and went with them to Holford, Brancker & Co., and

there they could see how that was to be obtained. True, the Trust Company had no money to lend, but they had credit; and Mr. D. satisfied the bank, before the transaction was entered into, that the company had such credit, and that it would be available as money to the bank.

The whole object of the bank was to raise money; not to circulate bills of credit, as held out in the trust deed. The character of the securities shows, that the loan was on one side only. The Trust Company gave mere personal security; their certificates. The bank gave the substantial security of land, and in a more efficient shape than a mortgage. If a mutual exchange of credit, there would have been no such course. They would have stood on the same platform, and exchanged personal security; or if there were a mortgage on one side, there would have been on both. It was a loan of credit to the bank, and calling it aught else, is a disguise and a cover.

2. This loan of credit by the Trust Company was usurious. If more than legal interest be reserved to the lender on a loan of credit, it is usury. In effect it is a loan of money. Unavailable credit is never sold. There is no such instance extant. Foreign bills of exchange are the subject of sale; otherwise of paper not available, and wherever that is used, it is a loan.

This is usurious, because more than seven per cent. was taken. It is said the Trust Company were to do so much, that the excess was for services, and all was merged. The first item of this sort, was the guaranty of the bank's bills of credit, and their sale and negotiation in London. The defendants' counsel himself, answered that, by his definition of interest; and the same is laid down in 2 Blackstone's Com.; the interest covered this risk. And these bills of credit became their property, when delivered to the Trust Company. If it were a loan, they took seven per cent., as a compensation for the use of the amount, and as an equivalent for the risk. It is a gross evasion of the usury law, for the lender, after getting these securities with seven per cent. interest, to take four, five, or ten per cent. to meet that risk. It is of no consequence to the borrower, whether the lender retains, or parts with the securities. But it is claimed, *if he part with*

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them, to have besides seven per cent., which covers his risk, an additional sum.

The guaranty and the commission for it, are therefore to be laid out of the question.

Now the compensation for remittance: If they are entitled to it, it must be reasonable. These were terms imposed by the lender, which were not wanted by the borrower. The bank wanted to give a different kind of security. They did not want to pay in London, or to advance here forty days before hand. The court will watch such transactions with a jealous eye. (4 Bing. 81; 4 Hill, 211, 225.) On an exchange of paper, a party may take a fair compensation. So it was held in the Dunham cases, and there two and one-half per cent. was held usury. Why? because, if there were borrowing and lending; or terms imposed on the party, the court must see they were reasonable. In 4 Hill, 211, a commission of two and one-half per cent. was allowed; but it was paid to the party's own broker, not to the lender or his agent. So it is valid, on a sale of credit, if unconnected with a loan.

Here the difference between \$4 86, and \$5, to the pound sterling, pays for all these things. The \$5 for £1, covers all, even if solid specie were transmitted. Then we have five per cent., payable on their certificates, and six per cent. reserved on our bonds, but payable here at seven. Then four per cent. is taken off from the whole principal, pell mell. Then one per cent. to Mr. Duer; \$7300, and upwards on the thousand shares of stock; and a loss of over \$12,000, on their certificates.

All these are to be taken into consideration, and show as gross a case of usury as could possibly be presented.

As to the stock, the testimony shows, what usually occurs, though not an express condition in nine cases out of ten, of usury. It is not required, yet is imposed. The Jew is very humble; he demands nothing; he gets offers. Mr. Holmes offered it in this case, and it was insisted on.

(The counsel then discussed the one per cent. paid to Mr. Duer.)

The transaction is grossly usurious, without these additions. To return to the main question. Suppose it a mutual exchange

of credits, in which each party desired the aid of the other. There the paper is not a subject of sale and transfer. I cannot make my note, and sell it; and so of an exchange by A. with B., for each other's note. Such paper is unavailable at the time; it is not an exchange of property. It is no more than a mutual loan of credit. A mutual loan of \$1000, by each to the other, is absurd; but such mutual loans of credit, are of common occurrence. Where the credit is equal, it may be done for the indorsement by each other. If on mutual loan of credit, more than legal interest be taken, it is usury. (*Dunham v. Dey*, before cited.) On the other hand, if it were a sale of the paper of others, and previously available, five or ten per cent. discount might be taken. But here the defendants do not pretend the paper was the subject of property on either side, until it passed to others.

If there be any inequality in the value of the credit, the same principles apply, but the loan is only on one side. The cases cited from 3 Wendell, 24 Wendell, and 4 Hill, were not those of an exchange of paper previously unavailable. And 3 Edwards, 148, was foreign bills of exchange sold, the same as on a sale of a house. Besides, in that case there was a distinction taken upon the ground of an express agreement for a loan.

So if the defendants had established their position, that this was a mutual exchange of credits; it would be governed by the same rules. Our credit was at once available in their hands; and the court is to see that they get by the operation, only their funds and legal interest.

Suppose a needy borrower applying to a capitalist, who says he has no money; but will lend his credit. The borrower offers and consents, to take his note for \$10,000, due in a year without interest, and to give his own note and a mortgage for \$10,000, in one year, with seven per cent. interest. The capitalist thus lends a credit, that the borrower may get money. Well, the latter gets \$10,000, less the 7 per cent. discount, say \$9300. The capitalist is only to pay \$9300, and a trifle for trouble, and receives at the end of the year, a little over 14 per cent. So where his note is given at 5 per cent. and the borrower's at 7. They say this is only two per cent. But the borrower gets only \$9800, and pays \$10,700. This is not so rank as the other, but it is usury.

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The variance between the market and par value, in a loan of credit, where wanted as money, is an element of usury. The depreciation in the certificates was such an element. (*Fanning v. Dunham*, 5 J. C. R. 135; Plowden on Usury, 169, 171; 1 Bro. C. C. 149; Douglas, 708.) Sales of goods were then in vogue. Now, stocks, credits, bonds, bills &c., are the order of the day. As in 7 Paige, 587, where uncurrent bills were taken; and *ibid.* 636, bills of exchange taken at a premium. And see 1 Denio, 136.

As to this being a London transaction. The chancellor in 6 Paige, 634, draws the distinction, and puts this actual case. The whole was done here, the money was obtained here, and here we were required to pay it. The payment abroad was for the other party's convenience. It was a New York transaction throughout.

THE ASSISTANT VICE-CHANCELLOR.—The contract set forth in the bill may be thus stated :

The American Life Insurance and Trust Company agreed to loan to the Dry Dock Bank \$250,000, on the following terms ;

1. The banking company were to deliver to the Trust Company, their own bills of credit; or bonds for the \$250,000, payable to the latter in sterling money, at five dollars to the pound, at a banker's in London, the interest to be paid half yearly, at six per cent. per annum, and the principal sum in instalments—£10,000 in July, 1842; £10,000 in July, 1843; £10,000 in July, 1844; and £20,000 in July, 1845. But instead of paying those bills of credit in London, the bank was to pay both interest and principal, to the Trust Company, in New York, (the interest at seven per cent.,) and such payments to be made in every instance, at least forty days previous to the time when they would fall due in London.

The whole sum of £50,000, with the interest, was to be secured upon the real estate of the bank, worth double the amount.

2. The bank agreed to allow a deduction of one per cent. from the nominal amount of the loan, which, as represented, was to enure to the private benefit of Mr. Duer, the vice president of the

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Trust Company, and to be paid to him on the completion of the agreement.

3. It was agreed that the bank should guaranty to Mr. Duer, that upon the consummation of the contract, he might and could purchase in the market, the stock of the bank to the amount of one thousand shares, at the rate of seventy per cent. of the par value of the same.

4. Instead of loaning to the bank the entire sum of \$250,000, it was agreed that the nominal amount should be reduced four per cent. ; and instead of money, that the bank should take and accept the Trust Company's certificates, or obligations for such reduced amount, (being £48,000, or \$240,000,) payable in London, with interest at five per cent.—part in 1839, and the residue in 1840.

The first inquiry in the case is, whether the complainants have proved the contract, as it is stated in their bill ?

Without adverting here to the point that there was no loan, I may say, that the terms of the agreement, which I have designated as the first and fourth, are not questioned by the defendants.

But their counsel insisted, with great force of argument, that in respect of the others, and especially the third, there was a fatal variance between the bill and the evidence.

First. As to the one per cent. agreed to be allowed to Mr. Duer. It is said that this, in the bill, is set forth as being exclusively a price or premium, for forbearance—whereas the proof, in its worst aspect, shows that a part of the amount was to be paid to Mr. Duer, as a counsel fee for examining the title of the lands conveyed as a security.

I think this objection is not well founded. The charge in the bill is very general, and does not state the one per cent. to have been for forbearance only ; it alleges that one per cent. of the amount of the loan was to be paid to Mr. Duer, and that as it was represented, the same was to enure to his benefit. All the testimony on the subject appears to sustain this allegation. Whether, as thus stated, it establishes usury, is another question, which I need not discuss in this place.

Second. In respect to the guaranty to Mr. Duer, of the purchase of the stock at seventy per cent., the variance insisted on

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is two-fold, viz.: that this agreement was not a term or condition of the loan; and if it were, the proof shows an agreement at seventy-five per cent., instead of seventy per cent.

In regard to its being a term or condition of the loan or transaction, the circumstances leave no room for doubt. If there were no testimony further than the cotemporary agreement, the inference would be irresistible that it was a branch of the contract for the \$250,000. I do not believe that Mr. Duer in express terms annexed it as a condition, and he certainly did not propose it. But when Mr. Holmes proposed it, it was at once acceded to, and Mr. Stebbins understood distinctly, that the transaction could not be completed without it.

Neither banks nor business men are in the habit of offering such bargains without an equivalent. It is no answer to the argument to say, that the committee on the part of the bank did not expect to lose much, because they then supposed that they controlled the stock. If they had expected no loss, a great profit was certain to ensue on the bank's resuming specie payments; and the committee were no more likely to throw this away, than they were voluntarily to incur a loss. No one can imagine, upon the undisputed facts in the case, that the bank would have entered into the engagement relative to the 1000 shares of stock, except in connection with the loan, and to insure its completion.

In the case of *Clague & al. v. Their Creditors*, (2 Martin's Louis. R. 114,) where there was no direct proof that the usurious advantages obtained by the lender collateral to the loan, were made a condition, the court held that the internal evidence afforded by the nature of the transaction, was sufficient to show who connected those advantages with it.

Next, as to the variance in the rate at which the stock was guarantied. The charge in the bill is distinct, that the rate was seventy per cent., and it is not relieved from that precise rate by any subsequent allegation, either in the bill or the schedules annexed.

The testimony of Mr. Holmes comes very near sustaining it, because he says the agreement was a little below the market price; three, four or five per cent. below it; and the market price is shown to have been from seventy-three to seventy-three and

one-half per cent. Mr. Duer, however, is entirely explicit. He testifies that the price agreed upon was seventy per cent.; and in this he is the more positive, because, as he says, when the affair was settled, he consented to pay several per cent. more than the price at which it was offered to him, and did pay more than seventy-five per cent.

It is proved by the certificate or obligation given for the difference, that the settlement was made at about seventy-five and one-half per cent. This, with what Mr. Holmes recollects, convinces me that the agreement for the stock was at the rate of seventy per cent. In this respect, therefore, there is no variance between the allegation and the proof.

A further variance was insisted upon, at the hearing, (although it is not found in the defendants written points,) in consequence of the charge in the bill, that the loss which the bank sustained in cashing the Trust Company's certificates, was contemplated by the contracting parties. It is claimed that the bill makes this expected loss one of the terms of the agreement, and that there is no proof that such loss was expected.

The charge on this subject is not made in connection with the statement of the contract, but follows the charge that the certificates were issued by the Trust Company in pursuance of the contract previously set forth. It is plain, therefore, that it was not intended to be set forth as one of the terms of that contract. It is true, the bill, in summing up the loss incurred, includes the discount upon the certificates, and alleges that the result thus shown, was certain and well known when the loan was contracted, and was usuriously exacted by the Trust Company.

But this general charge of usury, including three exactions which had previously been stated distinctly as being usurious, and as positive terms of the contract, can scarcely be construed into a statement that it was a stipulation in the contract that the bank should sell the certificates at a discount, or that such discount was an exaction for the Trust Company's benefit.

If the sacrifice on the certificates had been seriously argued as constituting usury in this case, it would be a sufficient answer to the argument that the bill does not set it up as forming a part of the agreement between the parties.

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I do not discover any variance between the complainants' allegations and their proofs, in regard to the contract in question.

The next inquiry is, was the transaction a loan; or was it a real exchange or mutual sale of securities, as it is denominated by the defendants?

In determining this point, the court must be guided by the nature of the transaction, and the objects of the parties in negotiating it, so far as those objects were mutually understood. The words used in such negotiations, do not always signify what the parties really intend. (*Barker v. Van Sommer*, 1 Bro. Ch. C. 149.)

The object of the Dry Dock Bank, was to resume specie payments, and save their valuable corporate franchises from forfeiture. To this end they wanted money, and nothing but money would answer the exigency. Their views and their necessities were fully known to the Trust Company. On the other hand, the Trust Company were strong in their capital and in their credit, and were fully conscious of both. They stood in no need of money, and had no occasion for an exchange of securities.

When a merchant, who is in want of money, applies to a capitalist for his note payable at a future day, and offers security by his own note, with an indorser, and the respective notes are executed accordingly, the transaction is a loan. When two merchants, who are both desirous of raising money, exchange their own notes, to be used for that purpose, with third persons, it constitutes an exchange of securities merely:—its effect is the same as if each had used his own note with the other's indorsement.

In this case, the Trust Company was the capitalist, and the bank was the merchant needing money, and offering real estate security for its re-payment.

From the relative situation of the parties, as mutually known; the transaction bears the aspect of a loan, and not an exchange of paper. The testimony of the witnesses on both sides establishes the fact, that the application of the bank was for a loan of the credit of the Trust Company, and that there was no proposition for an exchange of credits. The bank solicited a loan, not

of cash, because it was known that the Trust Company were not then in funds; but of paper credits, which, as the Trust Company pointed out, would produce cash to the bank. The Trust Company were to give no collateral security for their paper; the bank was to give security on real estate, unquestionably worth more than the loan; and finally, each of the bills of credit which the Trust Company received from the bank, recites that it is a part of a "*loan*" of £50,000.

Another argument, if any were needed, to show that this cannot be deemed an exchange of paper, is found in the statute which forbade the bank from making such exchange. While struggling to borrow, in order to avoid a forfeiture, the bank would not deliberately incur one, by violating this statute.

Next, as to the argument that the transaction was a sale of the paper of the bank, for that of the Trust Company.

This is but another phase of the idea of an exchange of paper, and is open to the same observations. The defect in the argument is, that neither a sale or an exchange, was the subject matter of the contract. The bank applied for and obtained a loan, offering and giving, as borrowers are compelled to do, satisfactory security. The Trust Company assented to the application, and made the loan. The form which the Trust Company thought it expedient to have the securities assume, when executed by the bank, cannot disguise or alter the nature of the transaction. There was no sale about it. The bank had lands and bills receivable, which were legitimate subjects of sale; but they did not want to sell them. Their own promises to pay, were not proper objects of sale, and were not offered for sale. The Trust Company were known lenders of money, but having none at the moment, they loaned their credit, in the shape of certificates of deposit, payable at short dates. They did not sell their certificates to the bank for the price secured by the deed of trust.

A merchant wanting \$1,000 from a bank, goes to the bank with his own note at six months, for \$1,035, properly endorsed, and applies for a loan of a post note of the bank at three months, and the bank issues such a post note for \$1000, and receives the note of the merchant.

Could this with any propriety be called a sale by the bank, of

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its post note to the merchant? Assuredly not. In this point of view, the expectation of the Trust Company, that they would have to guaranty the bills of credit of the Dry Dock Bank, is not at all material. That expectation had reference solely to the contingency, that in order to meet their own certificates, the Trust Company might have to obtain a loan on those bills of credit or otherwise. It does not affect the nature of the original contract, or alter its obvious character. The capitalist who lends his credit for a short time, is liable to be disappointed in the receipt of funds, and thus be driven to use his credit, to meet the paper which he issued. He may use such credit, either by drawing his own note, or by endorsing the paper which he received on making the loan. Neither the contingency, or the mode of obviating it, has any bearing on the nature of the original loan.

It is perfectly clear to my mind, that the transaction between these corporations, was a loan of its credit by the one, on the security of the real estate owned by the other.

The question is then presented, was the loan usurious? By the law of this state, every contract is void by which there is reserved or agreed to be taken, any greater sum or value than seven dollars on one hundred dollars for a year, (or in that proportion for a different period,) for the loan or forbearance of any money, goods or things in action. (1 Rev. Stat. 771, § 1 to 5; Laws of 1837, Ch. 430.)

It was contended by the defendants, that a loan of credit is not within the statute; but I cannot assent to the argument. To apply it to this case, the Trust Company loaned to the Dry Dock Bank, their certificates of deposit, payable at a future day. These were things in action, and within the letter of the statute. In effect, it was a loan of money, to be advanced at a future period. Any other construction of the law would nullify it at once, for every lender would refuse to loan money, and substitute a loan of his notes at short dates.

If there be a *loan*, it is void, provided more than seven per cent. interest is reserved—whether the loan be made in goods, in credits, or in cash.

In *Ketchum v. Barber*, (4 Hill's R. 225,) which was cited by the defendants, the transaction was upheld, (although by a bare

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majority of the judges, both in the supreme court, and in the court for the correction of errors,) on the sole ground that there was no loan whatever by Ketchum to the prior parties on the note. The loan was made by the Union Bank, and the majority of the judges in each court, held that Ketchum merely sold his credit by way of guaranty, or indorsement, as a surety. The result of the decisions, in *Suydam v. Westfall*, (4 Hill's R. 211,) and *Suydam v. Bartle*, (10 Paige, 94,) as I understand them, is, that an agreement with a commission merchant, who accepts bills to be met with shipments of produce, to pay him two and a half per cent. on advances he may be required to make on the drawer's failing to send sufficient produce, is not of itself usurious; but it is to be considered with other facts, upon the question whether the contract is a cover for an usurious premium, or merely provides compensation for services.

The case of *Stoveld v. Eade*, (4 Bing. 81,) was also cited. The court there held that there was no loan, nor any application for a loan. The report of the decision is not precisely intelligible. I do not perceive what the amount of the commission, or its being under or over five per cent., had to do with determining whether the transaction was a loan or an accommodation exchange.

The case of *Dunham v. Dey*, (13 Johns. 40,) and *Dunham v. Gould*, (16 *ibid.* 574,) in our own courts, are entirely decisive, that the loan of credit in this case is within the provisions of the statute against usury.

In this connection, I may as well consider the point urged, that on a loan of credit, the lender, exclusive of interest may charge a commission not exceeding seven per cent. per annum, and that the interest, which he reserved on the borrower's securities, is only an equivalent for that which he is to pay on the paper he issues or lends. The case of *Dunham v. Dey*, above cited, was decided on what I conceive to be the true ground, that a loan, whether of cash or credit, is to be subjected to the same rule.

That decision was affirmed in *Dunham v. Gould*; and although the chancellor dwelt upon the point, that the commission exceeded the lawful interest, (both sets of notes being payable

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without interest,) it does not appear that the court of errors discarded the principle adopted in the court below.

In *Fanning v. Dunham*, (5 J. C. R. 122,) which was relied upon in this branch of the case, Chancellor Kent did, indeed, hold the securities to be usurious, because the commission exceeded the legal interest for the time the notes had to run, and thus indirectly gave his opinion that they would not have been usurious, if the commission had fallen short of the interest. But he has never decided the latter proposition, so far as I can discover. And in view of the judgment of the supreme court in *Dunham v. Dey*, (13 Johns. 40,) if the weight of authority is not clearly against it, the point is at least untrammelled by any binding decision.

The first suggestion that occurs to me is, that if a charge for *commission* be tolerated at all, where there is a loan of credit, it must be regulated by a variety of circumstances in different cases, and that there can be no propriety in limiting it to the legal rate of interest. For example—one lends his note for thirty days only, in a time of great commercial embarrassment, when the chance of being disappointed by the borrower, (who gives his note at the same date,) is very great; and he charges a commission of one per cent. No merchant would say that this was not a reasonable, indeed, an inadequate commission. Yet, under the rule in *Fanning v. Dunham*, it would be usury, because it exceeded the interest for thirty days. Now take another illustration: A. lends to B., his notes payable with interest at two years, and B. secures him by a bond and mortgage, payable in three years with interest, and as a commission, A. deducts twelve per cent. from the amount of B.'s mortgage. This strikes the mind at once as being grossly exorbitant, yet it is less than the lawful interest for the two years, and still less in proportion for the three years.

The rate of interest allowed by law, I am confident, can furnish no criterion for the regulation of a commission; and I think that whenever a commission is charged by the lender, unless it be for some real service, distinct from the loan itself, as was the fact in *Hammett v. Yea*, (1 B. & P. 144,) and *Cayuga County Bank v. Hunt*, (2 Hill's R. 635,) and then be a moderate and

reasonable charge, it must infallibly be referred to the use of the money or credit loaned.

To test the matter further in loans of credit. Suppose A. applies to B., a lender of money, for a loan of B.'s note of \$1000, for one year; obtains such a note, not bearing interest, and gives his own note with sureties, payable at a year, with interest—then A., to effect his object, must sell B.'s note and turn it into money. He will be fortunate if he can find a broker who will discount it at seven per cent. If he procure it to be cashed at that rate, he will receive \$930, as his actual loan. At the end of the year, he will pay \$1070; or \$140 for the use of \$930 for a year. This is more than fifteen per cent. Yet on the argument urged by the defendants, it would be legal. Let us see how B., the lender, would come out of such an operation. If A. paid his note when due, B. would take up his own note with the money thus furnished, and receive \$70 from A., without advancing a farthing. If A. failed to pay his note, and B. were compelled to collect it by suit, the collection might occupy six months. In that event, B. would have to advance the \$1000 at the end of the year to pay his own note, and he would continue in advance six months. At the end of that time he would receive from A. \$1105, which would be \$105 for the six months' advance of \$1000.

The more probable course in the case put, would be for B. to discount his own note, through a friendly broker, with whom he would make a reciprocal arrangement, so that he would in fact advance the \$930 at the outset, and thus receive the fifteen per cent. for its use for one year.

There are so many modes in which this system might be pursued, and they are so obvious, that it is a waste of time to trace them farther. (See *Reed v. Smith*, 9 Cowen, 647.)

Suffice it to say, that if it be once settled as law, that a man may lend his own notes or his bonds on time, without interest, taking in return securities payable with interest, or may lend his own paper payable with interest, and in return take securities payable with interest, and include a commission for his risk and trouble, not exceeding seven per cent. per annum; the whole

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business of making loans will be transacted in this mode, and the statute against usury will be made a dead letter.

These observations are somewhat in advance of the order in which I proposed to treat this case ; but they are so connected with the consideration of loans of credit in respect of the statute, that it was more convenient to dispose of the whole subject at once.

I will next consider the facts which the complainants allege in their bill, constituted usury.

Their first point is made upon the deduction by the Trust Company of the sum of \$10,000 from the loan of \$250,000. The complainants gave their bills of credit secured by their real estate, for £50,000, which bills they were to pay in New York at the rate of five dollars for every pound sterling. In other words, they were bound to pay to the Trust Company \$250,000, with interest half-yearly at seven per cent.

The credit which the latter loaned to the bank was the sum of £48,000 in certificates, payable in London, and bearing five per cent. interest. At the same rate of five dollars to the pound, these certificates amounted to \$240,000.

This deduction of \$10,000, or four per cent. on the sum loaned, is defended as being a compensation for the Trust Company's guaranty of the bills of credit issued to them by the bank, and for the trouble, expenses and extraordinary risks, assumed by the company in twice remitting to London, and paying there the amount of \$240,000, or \$250,000 ; and the defendants urge that the understanding of the parties was explicit, that the Trust Company were to use the bills of credit of the bank, in order to raise money in London, and hence the necessity of the guaranty and the double remittance.

I am sorry to say, that I cannot give to these positions the force which was claimed for them by the learned and eloquent counsel for the defendants.

First, as to the guaranty. The whole point is, that the Trust Company, when their certificates for the £48,000 fell due, might be obliged to borrow the money to meet them, and instead of simply giving their own obligation to the lender, would transfer

the bills of credit of the Dry Dock Bank, or would sell them outright.

The lender or purchaser, it was supposed, would require the added liability of the Trust Company upon the bills of credit. Assuming this to have been the mutual expectation of the parties, I am at a loss to perceive what new risk the Trust Company incurred by the operation. In no event could they lose the \$250,000 more than once, and they were subjected to that risk while they held the bills of credit, precisely as they would be, after they had transferred them with their guaranty. The real estate of the bank was conveyed in trust, for the express purpose of guarding against the risk, and it was believed to provide for it effectually. The only further consequence, which the Trust Company would incur by such a guaranty, would be that they might be compelled once to advance the \$250,000. Whereas, if the Trust Company had sold the bills of credit to the amount of \$240,000, (or borrowed that sum on a pledge of the same,) before their own certificates fell due, and the Dry Dock Bank had punctually paid the bills as stipulated in the deed of trust, the Trust Company never would have advanced a dollar.

This was unquestionably the expectation of the Trust Company, if, as it is insisted, the original design was to use the complainants' bills of credit in London. The case differs in no respect from that of a money lender, who, instead of cash, lends his note at a year, and takes from the borrower a note at five years, secured by a mortgage; and who, at the end of the year, in order to provide funds to meet his own note, finds it necessary or convenient to use the mortgage and note of the borrower, and indorses the latter for that purpose. Suppose that on lending his note, he had avowed his belief that at the end of the year, he would have to indorse the borrower's note, and transfer his mortgage to take up his own note, and had thereupon required the borrower to pay him four per cent. on the sum loaned, as a compensation for his risk and trouble growing out of such indorsement. No court in this state could uphold such an exaction.

I can find no color for reserving the \$10,000 on this loan, in the contemplated guaranty of the bills of credit.

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Then, in regard to the double remittance from New York to London, and its extraordinary hazards.

To illustrate the claim made upon this ground, I will follow out the result, which in its various contingencies, might have ensued from this transaction :

First. In the event that the Trust Company had paid their certificates in London, by advancing the £48,000, retaining the bills of credit of the Dry Dock Bank. Then there would be no remittance to London on account of the bills of credit. Those would be paid here, as provided in the trust deed, and being held by the Trust Company would thereupon be discharged. The Trust Company would remit £48,000 to London to meet their certificates. For the whole expense of this remittance and payment, they were fully indemnified by the obligation of the Dry Dock Bank to pay to them here \$240,000, or five dollars for every pound sterling—a rate which was doubtless fixed upon as such indemnity.

The proof is abundant, that the difference between five dollars to the pound, and \$4 86-100ths, the legal value of the sovereign or pound sterling in 1838, would pay all the expenses incident to remittance and payment, either in bills of exchange or in gold coin. This difference sufficed to cover guaranty in a remittance of bills, and insurance, if specie were shipped. The \$240,000 would, therefore, make good the remittance and payment of the £48,000, with its attendant hazard.

Thus there is no double remittance in the first contingency which I have traced, and no pretence for the charge of \$10,000.

Next, I will take the mode alleged to have been intended by the parties :

The Trust Company would send to London the bills of credit guarantied by them, (either with or without a transfer of the charge on real estate, to which the bills refer,) and would raise £48,000 by a pledge, or a sale of those bills. With this £48,000 raised in London, they would pay their certificates as they matured. The funds being already in London, no remittance from New York, would be requisite to meet those certificates.

If, however, the Dry Dock Bank should fail to pay in New York, the amount of their bills of credit forty days before they

fell due, so as to put the Trust Company in funds to take up such bills in London when they became due, the Trust Company would necessarily make an advance and a remittance to London for that purpose. But for this remittance, they would have the five dollars to the pound, or \$240,000, which they could collect of the bank in New York, and which covers the whole charge.

It may be urged that the Trust Company, on selling the bills of credit in London, should not be compelled to keep the proceeds there unproductive, until their certificates became due; for this might subject them to a great loss of interest, if they availed themselves of the most favorable time for making a sale. I do not think that any such loss need to have ensued in the event supposed, or could have been contemplated by the parties. The obvious course of the Trust Company would be to sell exchange in New York, drawn against the proceeds of the bills of credit, and when their certificates matured, to buy exchange on London in the same market, and remit to meet them. The profit on the sale, would usually balance the expenses of the purchase. The testimony of the eminent bankers who were examined as witnesses, shows that the fluctuation in the value of exchange on London is not so great, but that five dollars for a pound sterling, furnishes a sufficient margin to cover any supposable difference in price, between the times of such sale and purchase.

A suspension of specie payments was adverted to; as to which it suffices to say, it would not suspend the contract, or make it payable in aught but gold and silver. There is no double remittance to be found in this way of carrying out the operation.

Lastly. I will suppose that the Trust Company were to make a remittance in the first instance, from their own funds, and thus pay their certificates. This, at five dollars to the pound, would require them to advance \$240,000, in New York. Then I will suppose that they subsequently sold in London, and guaranteed £48,000 of the Dry Dock Bank bills of credit. The proceeds drawn against from New York, would reimburse the expenses of the first remittance.

Then, if they were afterwards compelled to advance to take up the bank's bills of credit, the expenses of that remittance are pro-

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vided for in those bills, in the payment of five dollars in New York, for every pound advanced or paid in London.

The result is, that although in the case last put, the Trust Company might have to remit the £48,000 to London twice, yet the charges of the first remittance would be reimbursed by the sale or loan effected, upon the bills of credit of the bank, (without which sale or loan the second remittance could never be requisite,) and the charges of the second remittance would be fully covered by the \$240,000 payable in New York, for the £48,000 remitted.

I have said nothing of the contingency that the Trust Company might be unable to realize in London £48,000, on that amount of the bills of credit of the bank, even with their guaranty. It is not set up as forming any part of the inducement or consideration for the \$10,000 reserved; and it would be inconsistent with the ground taken, that the certificates of the Trust Company, bearing interest at five per cent. were worth par in London. Their naked obligations could not be worth more than these bills of credit, fully secured by real estate in the city of New York, and guarantied by the Trust Company.

In no point of view, have I been able to discover a reasonable ground for this deduction of \$10,000, in the loan in question. It must, therefore, be regarded as a premium or compensation for making the loan, and it being in addition to the reservation of seven per cent. interest, our law declares it to be usurious.

It is unnecessary for me, after this conclusion, to examine any of the other facts which are alleged as constituting usury.

The defendant Morrison insists, that the securities are not subject to be impeached by the imputation of usury, unless it be shown that they are usurious by the English law; because they were made with the intent to dispose of them in England, and his title arose under such a disposal made in London. I think the law is clearly otherwise, and that the securities must stand or fall by the laws of the state of New York. They were executed and delivered, and the loan was made in this city; here is the real estate by which the debt is secured, and the debt is payable here.

The bills of credit, though expressed to be payable in Lon-

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don, refer to the charge upon the real estate, and thus gave notice to Mr. Morrison, of the trust deed, and of its requirement that the Dry Dock Bank should make payment in New York. It is, in every sense, a New York contract, and would be so adjudged in the courts at Westminster Hall.

The views of the chancellor in *Chapman v. Robertson*, (6 Paige, 627, 632,) fully sustain this construction of the contract.

My conclusion is, that the bills of credit are usurious, and the trust deed by which they were secured, is void.

The complainants are entitled to a decree accordingly.

I have made no allusion to the policy of the law which leads to such a severe loss of property, nor to the character of the act by which it is enforced; for neither can be permitted to influence my judgment in the slightest degree. Whether the law be politic and just, or barbarous and oppressive, it is no part of my province to determine.

As the law of the land, I am sworn to administer it, and am bound to give effect to it fully. It is not to be treated with disfavor, or evaded by the courts.

So as to the character of the proceeding, by which this bank attempts to elude the payment of a very large loan, received at a time of peculiar and extreme necessity. However I may regard its immorality and its flagrant injustice to the extent of the actual loan, it is my duty to grant the complainants a decree, if they have brought themselves within the provisions of the statute against usury. The legislature, in 1837, deemed it expedient to require the court of chancery to take cognizance of these cases, without the preliminary step which the court had always before imposed on the party seeking relief from usury, the payment or offer of the sum actually loaned with the legal interest.

When a case is brought plainly within the provisions of the usury laws, and is within the jurisdiction of the court, the contract must be avoided, without any restriction or imposition of terms.

Decree accordingly.

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WHERE one having a large mortgage on a farm, payable at a distant period with six per cent. interest, at the request of the mortgagor, who had laid out the farm in town lots for sale, cancelled such mortgage and received in lieu of it, thirteen separate mortgages for the same aggregate amount, on thirteen distinct portions of the whole farm, payable when the original mortgage was to be paid, with interest at seven per cent. ; and at the same time received from the mortgagor five hundred dollars for granting the accommodation ; it was *held*, that the transaction was not usurious.

The advantages proposed to himself by the mortgagor, and the probable inconvenience and hazard to the mortgagee in the exchange of the securities, constituted the consideration for the payment ; and there was no loan or forbearance in the case.

November 8, 1845 ; February 6, 1846.

THE bill in this cause was filed by Michael Neefus on the 12th of November, 1844. It stated that on the first day of May, 1835, the defendant, A. Vanderveer, executed a mortgage for \$15,300, on one hundred acres of land in Flatbush in the county of Kings, to Michael and John Neefus. The mortgage was given for a part of the purchase money, and was payable five years from its date, with interest at six per cent., semi-annually. That John Neefus soon after assigned his interest in the mortgage to Michael N., the complainant. That in October, 1836, on the application of Vanderveer, who had divided the premises into blocks for the purpose of selling them in small parcels ; the complainant cancelled the mortgage of \$15,300, and accepted in lieu of it, thirteen several mortgages of Vanderveer, on as many distinct portions of the premises, with his bonds accompanying the same, payable with interest at seven per cent., half-yearly ; such mortgages in the aggregate amounting to \$15,300. At the same time, one C. Bennet, who held a mortgage on the entire hundred acres for \$4700, prior to the complainants, cancelled that mortgage, and received of Vanderveer thirteen several mortgages on the same distinct portions of the premises, for the aggregate amount, which were recorded so as to be prior to the complainant's thirteen mortgages respectively.

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The bill prayed a foreclosure of two of the mortgages so executed to the complainant in October, 1836.

The answer of Vanderveer and wife stated, that although the complainant when applied to, admitted that the portion of mortgage proposed for each section of the land, was the just and fair proportion of the whole original mortgage, and would furnish to him as adequate a security for the whole debt as he then held ; yet he would not grant the accommodation of subdividing the mortgage, unless in addition to the increase of the rate of interest to seven per cent., Vanderveer would pay to him in cash the sum of five hundred dollars for the loan and forbearance of the \$15,300, by way of usurious interest. And that Vanderveer was finally forced and obliged to agree to pay seven per cent. per annum, and the additional sum of \$500, for such new loan and forbearance. That a corrupt agreement was thereupon made between the parties, embracing those terms, the new mortgages being payable at the time in the original mortgage specified. That Vanderveer paid to the complainant the \$500, so agreed upon, upon which he cancelled the original mortgage and received the thirteen new mortgages for the same aggregate amount. The answer then alleged that the new mortgages and the \$500, were given for the loan and forbearance of the principal sum secured by the original mortgage, and that the transaction was usurious, and the new mortgages void.

The defendants proved that Vanderveer gave his note for \$500, to the complainant, in consideration of the latter's dividing the debt into thirteen separate mortgages on as many distinct portions of the property ; and that the note was paid. The witness stated that the complainant made many objections to splitting up his demand ; among others, the greater labor and perplexity of collecting and keeping proper accounts of the interest, the irregularities in its payment, and the danger of ultimate loss of parts of the principal of some of the mortgages. It appeared that Vanderveer's object, was to be enabled to sell portions of the land mortgaged in small parcels, which he could not effect so long as they were all incumbered by so large a mortgage. A map was introduced, showing his subdivision of the land into numerous blocks, with intersecting streets and avenues, laying

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it all out as a village plat ; and the new mortgages were given in accordance with these subdivisions.

It appeared by the original mortgage that the property was therein bounded and described as a farm.

J. A. Lott, for the complainant.

D. B. Tallmadge, for the defendants Vanderveer and wife.

H. C. Murphy, for C. Bennet.

THE ASSISTANT VICE-CHANCELLOR.—The usury as it is alleged in the answer, is quite incomprehensible. Neefus held a mortgage for \$15,300, payable May 1, 1840, with annual interest at six per cent. In October, 1836, he relinquished that mortgage, taking in lieu of it, thirteen mortgages on distinct parcels of the same premises, for the aggregate sum of \$15,300, payable on the same 1st of May, 1840, with interest annually, at seven per cent. ; and the answer gravely asserts, that for this new loan and forbearance, the mortgagor paid to Neefus \$500. The statement in effect is, that the mortgagor raised the rate of interest from six to seven per cent. on a mortgage which had nearly four years to run, and paid \$500, for the forbearance, when there was not a day's forbearance given. The answer itself, shows to my satisfaction, that the forbearance of the debt, was not the real consideration for the payment of the \$500.

It is however stated in the bill, and so is the proof so far as it respects the two mortgages now in suit, that the new mortgages were made payable on the 1st of September, 1840 ; and as matter of evidence, the defendants are perhaps entitled to insist that their answer is erroneous. But they encounter another serious difficulty, for this evidence does not sustain the agreement as it is set forth in the answer ; and the rule is very strict, in equity as well as at law, that in pleading an usurious agreement, its terms must be distinctly stated, and it must be proved as it is alleged. (*Smith v. Brush*, 8 Johns. 84 ; *Vroom v. Ditmars*, 4

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Paige, 526 ; *New Orleans Gas Light and Banking Company v. Dudley*, 8 *ibid.* 452.(a)

If the answer had been correct, as to the time of payment inserted in the new mortgages, the testimony fails utterly in supporting the alleged usury. The only witness sworn, so far from proving that there was to be any extension of time or forbearance says his opinion is that the principal was to be made payable at the same time, with the old mortgage. He shows not only that there was no agreement for an extension, but there was no negotiation for any thing of the kind. It was not treated of, or mentioned. It was not the subject of the mortgagor's application, or of the contract which ensued. How the 1st of September, 1840, came be inserted, is not shown ; but both the answer and the evidence prove, that it was not a part of the contract on which the \$500 was paid.

The evidence shows the nature of the transaction, and for what consideration that payment was made.

The mortgagor wanted to lay out this farm into town lots, and it was obvious, that a large mortgage covering the whole farm, would seriously interfere with the sale of such lots. He declared to the mortgagee, what in this point of view was plain enough, that it would be a material advantage to him, to have separate mortgages given on the sections which he proposed to lay out and sell.

It was equally obvious, that this scheme was not to work any advantage to the mortgagee. It was certain to occasion him inconvenience to some extent, quite likely to disappoint him in the punctual payment of the debt, and might possibly lead to actual loss. Thus he had a large security, the principal payable at one time, and the interest in a single annual sum. By taking thirteen mortgages, he would have to keep as many different accounts of the interest, and principal. The lots were to be sold subject to the mortgages, and it was extremely improbable, that thirteen different debtors would be punctual at all times, in paying their interest and principal. Then as to his security, errors

(a) And *Rowe v. Phillips*, 2 Sand. Ch. R. 14.

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of judgment might be made in the apportionment, as to the relative value of the different subdivisions ; in the division, the farm was to be cut up by streets and avenues, and by the new mortgages, the land included within the streets was virtually ceded to the public use ; the scheme for selling it in lots, might prove a partial failure ; and in the end the mortgagee might have to take the least desirable sections, in payment of the mortgages charged on them, and so detached, that they would not be valuable for farming, and not worth the amount of the mortgages.

For the anticipated advantages to himself, and the disadvantages to the mortgagee, the mortgagor offered and agreed to pay \$500, in order to have the mortgage for \$15,300, divided up into thirteen separate mortgages, on distinct parcels of land.

The evidence is positive, that this was the consideration for the \$500, and I see nothing unreasonable in it, and no color for calling it usury.

There is another objection to these mortgages, on the score of usury, viz. that although given on the 15th of October, 1836, and the old mortgage then cancelled, they were dated on the first of September, thereby including one per cent. more of interest for the intervening time, than was due on the old mortgage on the day of its cancellation.

It is a perfect answer to this, that the defendants sets up no corrupt or usurious agreement in respect of it, in their answer.

The discharge of the old mortgage, corresponds in date, with the mortgages in question ; but it is needless to speculate on the explanations which might have been given on this point, if it had been put in issue by the pleadings.

The complainant is entitled to the usual decree for a foreclosure and sale.

H. and N. WEED *v.* SMULL and MILES.

SMULL and MILES *v.* H. and N. WEED.

A receiver in a judgment creditor's suit, is entitled to the debtor's things in action, in preference to one who purchased the same with notice of the suit, after the bill was filed, and efforts made to serve the subpoena to answer. This was held, although there had been only slight diligence used to effect the service; there being no collusion or concealment.

The title of a receiver thus acquired, is a valid bar to a suit in equity by the purchaser of such things in action, against the party indebted to the judgment debtor.

A cross bill, which seeks no discovery, and makes no defence which was not equally available, by way of answer to the original bill; will be dismissed with costs.

October 23, 24, 1845; February 5, 1846.

THE circumstances under which these suits came before the court, are stated in the opinion delivered. It is proper to add, that after the receiver became vested with Hezekiah Weed's things in action, he compromised with Smull and Miles, for the claim of Weed prosecuted in his original suit against them, and which Nathaniel Weed sought to continue in the supplemental suit first above entitled. A great mass of testimony had been taken in H. Weed's original suit; the compromise was for a small per centage of the sum claimed by him to be due; and H. and N. Weed insisted, that it was collusive and fraudulent. On the other hand, Smull and Miles in their answer to the supplemental bill, set up the proceedings by which H. Weed's claim became vested in the receiver, and the compromise and discharge of the receiver, as a bar to the suit.

Both parties took testimony at large, on this part of the case. Smull and Miles also filed a cross bill, setting forth the same matters in substance.

B. W. Bonney, for Hezekiah and Nathaniel Weed.

E. Norton and *C. T. Cromwell*, for Smull and Miles.

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THE ASSISTANT VICE-CHANCELLOR.—The first bill is one of revivor and supplement, and its object is, to continue for the benefit of N. Weed, a suit prosecuted by H. Weed against Smull and Miles, for the recovery of a claim; H. Weed having assigned the claim to N. Weed, *pendente lite*. And the defence is, that the title of H. Weed to this claim, became vested in a receiver appointed by this court, and that it did not vest in N. Weed by H. Weed's voluntary assignment.

It appears that John Purchase, filed a judgment creditor's bill against H. Weed, in October, 1841, in which the subpoena to answer and the usual injunction, were served on the 16th of November, 1841. On the 17th of the same month, Charles Kent filed a similar bill against H. Weed, and a subpoena and injunction were issued the same day. Efforts were made to serve them, but without much diligence, and they were not served until early in January, 1842.

On the 27th of December, 1841, N. Weed agreed with H. Weed, to pay off the debt and costs in Purchase's suit, provided H. Weed would assign to him this claim against Smull and Miles. He paid Purchase accordingly on the 29th or 30th of December, and H. Weed, on the 30th of December, executed to him such assignment. The suit of Kent was prosecuted to a decree. A receiver therein was appointed, and H. Weed assigned all his effects to the receiver, pursuant to the usual order of the court. The receiver subsequently compromised the claim in question, with Smull and Miles.

These are the outlines of the case, so far as I deem it necessary to enter into it on these pleadings.

One point was very much controverted in the testimony, and at the hearing, viz: whether N. Weed was informed of the filing of Kent's bill, before he paid the debt and costs to Purchase. I shall not attempt to reconcile the discrepancy in the testimony as to the date of that payment, for I think it is fixed by undisputed facts. The answer of the Weed's to the cross bill states explicitly, that the money for the payment to Purchase, was advanced by N. Weed, *at or immediately after the execution and delivery of the assignment*. This must be taken as conclusive, that it was not advanced before the assignment was executed.

Harvey A. Weed is positive that the assignment was drawn on the 29th day of December, and that it was executed at his father's house by H. Weed on the 30th of December, in the evening. On that day, H. A. Weed was notified in writing of the filing of Kent's bill, and he informed his father of it as early as the middle of the afternoon. If he had omitted to inform N. Weed, he was N. Weed's solicitor in that transaction, drew the assignment, negotiated with Purchase, and paid the money for his father; so that notice to him would probably be equivalent to notice to N. Weed. (See *Kennedy v. Green*, 3 M. and K. 699.)

N. Weed, therefore paid the money with notice of Kent's suit, and was chargeable with notice of its objects.

It is insisted, however, that the filing of Kent's bill did not create a *lis pendens*, or give him any lien upon H. Weed's things in action, as against N. Weed, until the service of the subpœna and injunction on H. Weed. Without deciding whether the attempts made to serve the subpœna, were sufficient to create a *lis pendens* against strangers, I am satisfied that the filing of the bill, and those attempts, were fully sufficient to give the creditor a lien as against H. Weed, and every person taking an assignment from him, with notice of the proceedings. The judgment of the Chancellor in the case cited by Weed's counsel, (*Hayden v. Bucklin*, 9 Paige, 512,) concedes throughout, that if the parties in that case had been notified of the filing of the bill and issuing the subpœna, before the assignment was executed, it could not have been upheld.

N. Weed having advanced his money with notice, is in no better condition than if he had taken an assignment to provide for a precedent debt. If Kent's suit were shown to have been collusive, the case would be wholly different. But I perceive no good reason for suspecting that it was collusive. Admitting that the proceedings after the receiver obtained this claim, were all that Mr. Weed's counsel charges upon them, (as to which I am not called upon to express any opinion,) the small amount of the Kent judgment, and the repeated calls on H. A. Weed to pay it, preclude the supposition that there was any intentional concealment of the suit, or delay in serving the subpœna. If

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the suit were prosecuted in the hope that it might result in extinguishing H. Weed's claim against Smull and Miles, it proves no fraud. Kent's judgment was a valid debt, no step was taken to enforce it which was not strictly proper, and a payment of the debt and costs, would at any time have put an end to the possibility of realizing such hope. The delay in serving the subpoena, is satisfactorily explained, by the circumstance that the injunction in favor of Purchase, restrained H. Weed from parting with any property, and by the solicitor's reasonable expectation of meeting with him, as he had done on former occasions.

My conclusion is, that Kent had acquired an equitable lien upon the claim in question, before it was assigned to N. Weed, which was valid against the latter, taking his assignment with notice of Kent's proceedings; and that the receiver in Kent's suit, became vested with such lien, and with all H. Weed's title to the claim.

This defeats the title set up by Mr. Weed in his bill of revivor, and that bill must be dismissed with costs.

I think the cross bill should not have been filed. It seeks no discovery, and makes no defence which was not equally available by the answer to the original bill. With this view of it, I must decline to investigate the angry controversy which grew out of it, in respect of the acts of the receiver.

The cross bill must be dismissed, with costs to the defendants to the putting in of their answer, and the costs of a hearing as upon bill, answer and replication. I omit the intermediate costs, because they relate almost exclusively to the receiver's proceedings.

Decree accordingly.

Kobbi v. Underhill.

KOBBI v. UNDERHILL.

The acceptance of the drawee's check which proves to be of no value, on presenting a sight draft, is not a payment, as between the drawee and the holder, unless there was an agreement to receive the check in payment.

The giving up the draft, is not evidence of such agreement.

Chancery has jurisdiction in general, to compel the delivery up of securities wrongfully withheld; and it will be exercised, although the case be remediable at law, if no objection to the jurisdiction be taken by demurrer, or in the answer.

The presentment of a check, the next day after it is drawn, is in time, where the parties reside in the same town where it is payable.

December 20, 1845; February 7, 1846.

THE bill was filed May 19th, 1845, to compel the defendant to deliver to the complainant, a bill of exchange drawn on the former, by a house in Philadelphia, and remitted to the complainant. The cause was heard on the pleadings and proofs. The facts are stated in the opinion of the court.

N. D. Ellingwood, for the complainant.

N. Van Vran Ken, and *R. H. Waller*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The complainant having received from his Philadelphia correspondent, a bill of exchange on the defendant, payable at sight, presented it for payment on the 15th of May, 1845, received for it the defendant's check on the Merchant's Bank, and delivered the bill to the defendant. The check was presented for payment at the Merchant's Bank, the next morning, and payment refused. It was thereupon protested, and it has never been paid. The complainant immediately demanded the bill of exchange from the defendant, who declined to give it up, although it remained in his possession. If the check had been presented at the bank, on the day of its date, it would have been paid. This bill is filed to compel the defendant to deliver up the bill of exchange.

The defendant contends first, that the acceptance of the check was a payment, the holder not having used due diligence to collect

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it. As to this, the acceptance was not of itself, a payment of the bill, because there was no agreement that it should be deemed a payment or accepted as such. (*Cromwell v. Lovett*, 1 Hall's R. 56; *Olcott v. Rathbone*, 5 Wend. 490.)

The complainants used due diligence, in presenting the check for payment. (Story on Prom. Notes 625, s. 493, and the authorities there cited.)

It is further said that if not a payment between these parties, it was a discharge of the other parties to the bill of exchange, and the defendant cannot safely give it up, without a previous adjudication upon the rights of those parties.

This furnishes no defence here. The answer does not raise the objection, that the other parties should be brought in, and their rights are not at all in question in this suit. It suffices that the defendant has no cause for withholding the possession of the bill from the complainant. This also furnishes an answer to another objection of the defendant, viz. that the actual possession of the bill, is not necessary to the complainant. If not necessary, (and I express no opinion as to that,) it will surely be very inconvenient for him to collect it without having its custody; but this is of no consequence to the defendant, who has no pretence to retain it himself.

Nor was the complainant bound to enter into the controversy, between the defendant and the Merchant's Bank. The latter were the defendant's bankers and agents, and the holder of his check discharged all the duty thereby imposed upon him, by presenting it to such agents for payment.

The only remaining point taken, was that there was a full remedy at law, and this court has no jurisdiction of the matter.

The court has jurisdiction in general to compel the delivery up of securities wrongfully withheld, and in order to oust that jurisdiction, on the ground that the courts of law afford a sufficient remedy, the objection must be taken by demurrer, or in the answer. It comes too late at the hearing.

The complainant is entitled to a decree, with costs.

H. RHODES v. G. RHODES and others.

In general, the payment of the consideration, is not such a part performance of a parol agreement for the purchase of lands, as will relieve it from the operation of the statute of frauds.

But where the consideration consists of services to be rendered, which are of such a peculiar character, that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend to measure them by such a standard; the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol.

This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family, agreed to provide for and take care of the other, who had no family, and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter.

Held also, that the contract was so far certain and reasonable in its terms, that it ought to be enforced in equity.

Ithaca, September 23, 24, 25, 1845; February 18, 1846.

THE bill in this cause was filed, February 7th, 1843, by Henry Rhodes against his brothers, George Rhodes and Jacob Rhodes, and two married sisters with their husbands. It set forth that by the will of their father, a farm of upwards of two hundred acres, situate in the town of Lansing, in the county of Tompkins, was devised to Henry Rhodes, and Andrew Rhodes, since deceased, as tenants in common. That they took the farm, and for several years, occupied it together, conducting it on joint account, and owning in common, all their stock, farming utensils, and other movables. That in 1828, Andrew, having become subject to severe and dangerous attacks of epilepsy, and thereby incapacitated from labor, as well as requiring constant and watchful care and attention; agreed with Henry, that the latter should provide for and attend to him during his life, and that Henry should have, as a compensation therefor, all of Andrew's real and personal property. At that period, Henry had a family; Andrew was unmarried, living in Henry's family, and so continued until his death. That in pursuance of this agreement, Henry and his family did attend to Andrew, and provide for him suitably and to his entire satisfaction, until his death in 1841;

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and after the agreement, Henry took and retained the exclusive possession of the whole property.

The defendants as heirs at law of Andrew, claimed to inherit the undivided half of the farm, with all his brothers and sisters, and one of them, George Rhodes, commenced an action of ejectment against Henry, for the recovery of his share.

The defendants in their answer, denied the agreement alleged in the bill, and insisted that if any agreement were ever made between Henry and Andrew, it was not in writing, and was void. A large number of witnesses was examined on both sides. The principal issue was upon the making of the agreement, and so much of the opinion as discussed this question, as well as the testimony bearing upon it, is omitted.

There had been a previous suit between the parties, relative to the personal property of Andrew Rhodes, which, with some other circumstances, will be found adverted to in the opinion.

G. D. Beers and *A. Dana*, for the complainant.

S. B. Cushing, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—In my view of this case, it turns almost exclusively upon the facts put in issue by the pleadings; and the law applicable to those facts is free from difficulty. For the better understanding of the subject, I have again carefully read the whole of the voluminous testimony introduced, and I will now state my conclusions.

The bill sets forth a contract by which, in 1828, it was agreed between Andrew and Henry Rhodes, by parol, that Henry should attend to and provide for Andrew, during his life time, and as a compensation therefor, should have all of Andrew's real and personal property.

The inquiries which the pleadings present are; first, was such a contract made; second, was it certain in its terms, and sufficiently reasonable to be upheld and enforced; third, was it performed on the part of Henry Rhodes; and fourth, was it such an agreement as equity will carry into execution, although it was not in writing?

FIRST. Was such a contract made as is stated in the bill ?

(The court then examined the proofs in the case at great length, and in conclusion, said :)

After scrutinizing and weighing the testimony with all the care and attention of which I am capable, the result is a clear conviction, that such a contract was made between Andrew and Henry Rhodes, as is stated in the bill.

SECOND. I will inquire whether this contract was certain in its terms, and so far reasonable that it ought to be enforced.

It was sufficiently certain. On the one side, Henry was to attend to and provide for Andrew, during his life time ; on the other, Andrew agreed that Henry should have all Andrew's real and personal property. It was objected that the agreement made no provision, as to how the property was to be transferred. Such a provision was not necessary. If Henry and Andrew had joined in a contract with the witness, North, by which for \$4000, he should have their farm on lot No. 72 in Lansing ; on payment of the price, Mr. North would have had no difficulty in compelling them to convey the farm to him in fee. He would have obtained all their title, but without any covenants. This in part anticipates another objection, that the contract leaves it in doubt, whether Henry was to have the whole farm, or merely the use or income of the farm and the other property. I think the language precludes any doubt upon that point. Henry was to have *all* the property, not the use of all of it, or its income, or any thing less than all.

The case of *German v. Macklin*, (6 Paige, 288, 292,) cited by the defendant's counsel, does not aid his clients. The chancellor objected to the contract there set up, that it was not alleged that the party agreed to maintain his mother for life, or for any other particular period in consideration, that she did or would agree to convey the whole premises to him ; which portions of the agreement, are in this case distinctly and fully stated. Nor is there any want of mutuality here. If Andrew had conveyed the property to Henry, in performance of his part of the agreement, this court would have compelled Henry to attend to and provide for Andrew, or to compensate him to the full extent of the property conveyed.

It would have been better for both, if they had made their contract in writing. But they were brothers, having perfect confidence in each other, which this whole case proves, was not misplaced ; and they probably deemed any writing between them unnecessary, if not an imputation of want of good faith.

Next, was this agreement reasonable in its terms, or was it so inadequate and unequal, as to require the court to decline enforcing it specifically. It does not appear how much property Andrew had in 1828. His interest in this farm was worth about \$2023, and probably his whole estate may be safely assumed to have been \$2500. It was entirely uncertain how long he would live, or how much care and attention he might require. He might have been carried off in a fit, within a week ; and then the contract would have been thought by most persons, as most grossly inadequate. On the other hand, he might have survived twenty years, and during a great portion of the time, have been a constant tax upon the kindness, assiduity and care, of Henry and his household. It is evident that in weighing the consideration of this agreement, regard must be had to both of these contingencies, and to the probability of the longest duration of life. As the event proved, he survived for nearly thirteen years.

Andrew, the owner of this property, conscious that he was laboring under an incurable disease, one that was frightful to all who came in contact with him, having no children, and no one so near to him in love and affection, as Henry, with whom he had always lived ; desired to secure to himself an asylum for life, in Henry's family, with the just expectation, that he would receive from him and them, that care and attention, which enduring affection alone could bestow, and which money could not purchase. For this object he was willing to devote his whole property. Henry on his part, consented to give him this attention through life, and maintain him for his property. Probably no such bargain would have been made between Andrew and a stranger ; nor is it probable that Henry for the same amount of property, would have agreed to take care of a stranger for life, who was laboring under the same disease that visited Andrew.

But I am sure no one who reads the testimony in this cause, can doubt for a moment, that the consideration which Henry ac-

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tually made to Andrew for the property, was full, valuable and most ample. Before Henry assented to the arrangement, his brother Frederick had declined to take Andrew on the same terms. The character of the duty which Henry underwent, is shown by the fact, that their brother Jacob was so much affected by seeing a single fit of Andrew's, that he could not remain in the house, and would not return to it the same night. No witness was produced who would have taken care of Andrew, as Henry did, for all his property; and few that could have been induced to do it, on any terms. For this service, requiring constant and unceasing watchfulness, harrowing to the mind, destructive to the peace and comfort of his family, and injurious to his own health; no one can say that the compensation which Andrew contracted to make, was unreasonable or extravagant.

Much of the result might have been justly anticipated in 1828, when the contract was made. If it had proved far worse, Henry was bound to go through with it; and if Andrew's death had occurred much sooner, it would not with propriety have varied the estimate of the consideration for the contract. I am satisfied that the court ought not to withhold its aid on this ground, but should decree a specific performance.

THIRD. The performance of the agreement, on the part of Henry Rhodes, is not disputed or questioned. Nor has the tongue of envy or malice, so much as suggested, that it was not most fully and faithfully performed. Andrew himself manifested his estimate of this, and his deep sense of gratitude for the kindness of Henry and his family, in his conversation with one of the witnesses, several years before his death.

FOURTH. It remains to inquire whether equity will decree the performance of this parol agreement.

The defendants insist that if any contract be proved, it is void by the statute of frauds. It is questionable whether the allegation in their answer, that if there were any contract, "the same is utterly void," can be deemed a plea of the statute of frauds. But without stopping to look into that technical point, I think the circumstances of this case, take it out of the statute on well established principles.

It is settled that the payment of the consideration, will not in

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general, be deemed such a part performance, as to relieve a parol contract from the operation of the statute. But the reason for this, viz. that in such a case the re-payment of the consideration, will place the parties in the same situation, in which they were before, shows that the rule applies to a monied consideration only. If the consideration for the contract, be labor and services, those may sometimes be estimated, and their value liquidated in money, so as measurably to make the vendee whole, on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character, that it is impossible to estimate their value to Andrew Rhodes, by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard ; it is out of the power of any court, after the performance of the services, to restore Henry Rhodes, to the situation in which he was, before the contract was made, or to compensate him in damages. The case is clearly within the rule which governs courts of equity, in carrying parol agreements into effect, where possession has been taken, or monies laid out in improvements upon the land sold. (2 Story's Eq. Jur. § 759 to 761 ; *Lord Redesdale, in Clinan v. Cook*, 1 Sch. & Lef. 41.)

There is also the further ground here, that Henry Rhodes in pursuance of this agreement, went into possession of the share of Andrew, and made permanent and valuable improvements to a great extent ; certainly to an extent which it would have been improvident for him to have incurred, if on Andrew's death, all his heirs were to become owners of his half of the farm.

On the hearing I was referred to an opinion of my predecessor, in a suit by the administrators of Andrew Rhodes against Henry Rhodes, decided in July, 1842, in which he came to the conclusion that the agreement in question here, was not proved. I entertain a profound respect for the learning, ability and fidelity of my much esteemed predecessor, and would gladly have had the benefit of his opinion to guide me, if not to control me in this case. But his decree is not alluded to in the pleadings or testimony, and I have been obliged to decide the case as if there had been no previous suit. I am not apprised as to the details of the testimony upon which Vice Chancellor Hoffman pro-

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ceeded. And it was said at the hearing, that neither Frederick Rhodes or Mary Ludlow, two of the most important witnesses for Henry Rhodes, were examined in the former suit.

I have not considered the agreement of 1828, in respect to the personal property which Andrew then had, nor is it necessary that I should. I will venture to suggest however, that inasmuch as the contract might by the death of Andrew, have been fully performed within a year, it did not fall within the provision of the statute then in force, regulating parol contracts for services and works. (1 Rev. Laws, 78, § 11; *Lockwood v. Barnes*, 3 Hill, 128, and cases in the notes.)

There must be a decree declaring the validity of the contract, and directing the defendants to release and convey the land in question, to the complainant; and the ejectment suit commenced by George Rhodes is to be perpetually enjoined. Neither party is to recover costs against the other.

Decree accordingly.

GREEN and TALMAGE, Receivers, &c., v. A. SEYMOUR and others.

A corporation cannot enforce a mortgage which it has obtained by a transfer, taken contrary to the express provision of its charter.

The mortgagor may avail himself of such illegality, and thereby show that the corporation has no valid title to the mortgage.

A corporation which has discontinued its business pursuant to its charter, cannot resume it without the sanction of the legislature.

A statute relating to a corporation, which required an acceptance of the act to be filed, or else to be void, was never accepted.—*Held*, that the corporation could not derive any advantage from the passage of the act. At most, the act during the time for accepting it, could only be deemed a recognition of the lawful existence of the corporation as it was previously.

The charter of an insurance company provided, that if on any anniversary day of electing its directors, stockholders owning two-thirds of the whole amount of the stock subscribed, should vote to discontinue its business; the directors should cease forthwith from doing any new business, or operations of any kind, except to accelerate closing its concerns; and they were to wind up its affairs as soon as might be. After transacting business three years, at the annual election of di-

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rectors, more than two-thirds of the outstanding stock voted to discontinue the business of the company. The company then owned about a third of its stock, on which there was no vote. The directors proceeded to close its affairs, and had completed the work, except in respect of a few doubtful debts, and some unsaleable real estate; when six years after the vote, the company commenced the business of discounting notes and circulating its checks, in the similitude of bank notes. In this business the corporation became the holder of sundry promissory notes, and a mortgage was subsequently assigned to it by the maker, as collateral security. In a suit by the receivers of the company, to foreclose the mortgage, *held*—

1. That the vote was a sufficient compliance with the charter, to work a discontinuance of the business of the company.
2. No previous notice of the intention to take a vote on the question, was necessary.
3. The stock owned by the corporation was properly excluded, in computing the vote of two-thirds of the stock subscribed.
4. That the resumption of business by the corporation was unlawful; although its corporate existence continued for the purpose of closing its old affairs. And
5. That the mortgage could not be enforced in its behalf.

October 10, 11, 15, 1845; February 20, 1846.

THE bill in this cause was filed, October 26th, 1842, by Henry Green and Thomas G. Talmage, as receivers of The Utica Insurance Company, to foreclose a mortgage on lands in Westmoreland in the county of Oneida, executed by Asaph Seymour to Russell Clark, to secure \$1400, dated December 1, 1817, and assigned to the Utica Insurance Company, October 30, 1827.

The defence was, that when the company took the mortgage, the act was illegal, because by law it could transact no business of that kind; that the mortgage was taken in violation of the restraining act, and therefore it cannot be enforced in behalf of the company; that the mortgage had been paid and satisfied to the mortgagee; and some subordinate grounds.

The testimony on these points was very full; but all that need be stated on this occasion, will be found in the opinion of the court.

W. Curtis Noyes, for the complainants.

J. F. Seymour and *C. P. Kirkland*, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The fifth section of

the act incorporating The Utica Insurance Company, provides that if, on any anniversary day of election for directors, the *stockholders owning two-thirds of the whole amount of the stock* subscribed to the corporation, should vote to discontinue the business of the corporation, *it should be the duty of the directors to cease forthwith* from assuming any new risk of insurance, and *from doing any new business, or operations of any kind whatever*, excepting such as might tend to accelerate the closing of the concerns of the corporation. It was also made the duty of the directors, as soon as might be, to dispose of all its property, collect its debts, discharge all the claims against the corporation, and divide the residue among the stockholders; and upon this being accomplished, it was declared that the corporation should cease and be dissolved. (Laws of 1816, ch. 52, p. 47, §§ 5 and 6.)

The company transacted business under this act till the sixth day of July, 1819. On that day the capital stock outstanding and held by stockholders, was 1280 shares, on each of which shares, \$70 had been paid in. The residue of the capital stock mentioned in the charter, 720 shares, was owned by the company, having been received in payment of debts due to the company, and otherwise.

The sixth of July, 1819, was an anniversary day for the election of directors of the company, and at the election on that day, stockholders owning 1037 of the 1280 outstanding shares of the company, voted in pursuance of the 5th section of the charter, to discontinue the business of the company.

The directors proceeded to dispose of the property, pay the debts of the company, and divide the proceeds. On the 1st of September, 1819, they adopted a resolution, to receive shares of the stock at \$60, in payment of debts, and on the 23d of September, they directed their secretary to sell at auction the furniture of their office, and it was sold accordingly. Their banking house, after being advertised for sale, was turned into a dwelling, and leased for that purpose, and subsequently was occupied as a school house. Their loans were called in and collected. The directors paid a dividend of the capital stock, amounting to twenty per cent. on the first of March, 1820, ten per cent. on the

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15th of April, twenty-five per cent. on the 15th of June, six dollars on a share on the 8th of September, and two dollars and fifty cents on a share on the 7th of December, 1820. In the whole, \$59 on each share of the capital, was returned to the stockholders in dividends, the last of which was made on the 3d of May, 1821.

In short, as was testified by Mr. Johnson, (who in 1819 was their secretary and treasurer,) the directors, in pursuance of the vote of the stockholders on the 6th of July, 1819, from that time ceased from assuming any new risk, business or operation, except such as tended to accelerate the closing of the concern, and took measures to close it as speedily as possible. The debts of the company were paid, and their bank notes were destroyed as fast as they were returned. Their outstanding risks were taken by an insurance company in New York. In May, 1823, the whole effects of the company had been distributed, except a few outstanding debts due to them, from which the directors expected to realize only a small sum, and their banking house and lot in Utica, which they had endeavored for three years to sell; but without success, though it had been offered at auction, for less than half its original cost.

All the stockholders who voted for directors at the election in July, 1819, voted to discontinue the business, and it does not appear that any stockholder ever dissented from, or disapproved of, that vote, or of the subsequent proceedings of the directors to wind up the affairs of the corporation.

Thus in 1823, the Utica Insurance Company had ceased to exist, for the original purposes of its charter, as entirely as if it had been dissolved by a decree, or its charter repealed by the legislature.

So far, its affairs had been mainly conducted in Utica, which was the place evidently contemplated by its charter, as the sphere of its operations.

In 1825, the venue was changed. On the 29th of March, a meeting of the directors was held at the Company's office, in New York, at which the engraved checks of the company for \$50,000, were directed to be signed by the president and secretary for emission. It appears that the direction of the business from that

time, was in New York, although an office was kept in Utica ; and the company early in 1825, commenced and for several years, pursued the business of banking, both in New York and Utica, discounting bills and notes, and circulating their engraved checks in the form, for like sums, and in the similitude of the circulating notes of the chartered banks.

In the course of this business, the company became the holders of certain notes, on which Russell Clark was a party as one of the makers. One of the notes was first in their possession in July, one in August, and another in November, 1825. They were all discounted by the company for the parties, and the testimony is strong, that the proceeds were paid to the borrowers in the circulating checks before mentioned. The mortgage in question in this cause, was transferred by Russell Clark to the company in 1827, or 1828, as a collateral security to the debt thus originated ; and in October, 1842, this bill was filed by the receivers to foreclose the mortgage.

The defendants insist that the Utica Insurance Company in 1825, was dissolved, and had no legal existence as to this transaction ; it had no power to make such contracts, or to obtain a title to this mortgage, and that it never had any title to the mortgage.

There was much discussion at the hearing on the point, whether there was a total or partial dissolution of this company. I think it is unnecessary to determine that question. There was an unquestionable corporate existence, and capacity to sue, till 1836, in reference to the transactions prior to July 6, 1819, and to the necessary and reasonable incidents to closing its affairs after that date.

The complainants insisted that the vote in July, 1819, was not a vote of the stockholders, owning two thirds of the capital stock. That the 720 shares owned by the corporation ought to be taken into the account. But this is not correct. Those shares were merged, for the purposes of this vote. The stockholders owning the 1280 outstanding shares, owned the whole corporation, and all its effects. They were the owners of the whole amount of the capital stock which had been subscribed to the corporation, and a vote of two thirds of the 1280 shares,

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would have been a full compliance with the fifth section of the charter. *Ex parte Holmes*, (5 Cowen, 426,) is in principle decisive of the question.

It was also urged, that previous notice should have been given, of the intention of bringing forward the subject of discontinuing the company's business. The answer to this is, that the charter required no such notice. Its permission to take such a vote on any anniversary day of election for directors, was a standing notice to the stockholders, that on any such day the question might be agitated and disposed of. Besides, the large vote for discontinuance, and the silence and acquiescence that followed, furnish strong evidence, that all the stockholders concurred in the measure.

As to the banking business alone, being within the vote of the stockholders, there is no such limitation in the vote itself, or in Mr. Johnson's proof of it. Nor was the subsequent cessation of business, confined to that department. The directors alone might have discontinued banking. The vote of the stockholders under section fifth could not be taken upon a partial discontinuance of the business.

Then what was the effect of this vote to discontinue the business of the company?

The charter says, "it shall be the duty of the directors forthwith to cease from doing any new business whatever." In other words, it prohibits the company from discounting notes, making loans, or assuming risks of insurance, from that day forward, except to accelerate the closing of its concerns. There is no testimony, nor is it claimed, that the transactions with Russell Clark in 1825, and subsequently, had any connection with the old business of the corporation, or tended or were designed to accelerate the closing of its concerns.

The charter did not grant to the directors or the stockholders, any power to reconsider their vote to discontinue business, or to revoke the decision thereby made. When once made by the requisite amount of the stock, it was final, and irrevocable except by the legislature. The persons who resuscitated this company in 1825, did not set up or attempt to exercise any power of revocation. It seems that they sought to obtain an indirect legisla-

tive sanction for going on ; but failing in that, as I will presently show, they proceeded with a cool disregard, both of the vote of 1819, and the sovereign power of the state.

On the 13th of April, 1825, an act was passed making various provisions relative to the Utica Insurance Company, among others prohibiting it from banking, and from keeping an office elsewhere than in Utica. It required the corporation to file an acceptance of the act with the secretary of state, within six months, or else the act was to be void. (Laws of 1825, Chap. 193, p. 218.) The corporation did not file any such acceptance, and its directors voted that they would not accept it.

Still it is contended by the complainants, that the passage of this act was an admission of its full corporate existence by the sovereign power.

As to this position, until the corporation accepted it, the act could not be deemed a recognition of any more than its actual and lawful existence ; and it was a living corporation for many purposes, at that time. It could sell and convey its real estate, collect its old debts, and divide its remaining assets among its stockholders. But the act itself became void, by its non-acceptance, and it is therefore precisely as if it had never been enacted. The company could derive no advantage from it in any form, except by accepting it unconditionally. (See Angell & Ames on Corp. 51, 54, 2d ed. Chapt. 2, s. 7; *The King v. Westwood*, 2 Dow. & Clark P. C. 21; *The People v. The Kingston and Middletown Turnpike Road Company*, 23 Wend. 193.)

The act of May 26, 1841, which was also relied upon, does not aid the complainants. It authorized the court of chancery to appoint receivers of this corporation, and vested them with all the property which it had when its charter expired. (Laws of 1841, Chap. 318, p. 307.) It did not grant directly or indirectly, any rights to the receivers, which were not possessed by the corporation itself when its existence terminated. And as a recognition it goes no farther than I have already assumed, viz. that it had a legal existence for many purposes until 1836.

The question remains, did the Utica Insurance Company

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acquire a title to this mortgage, which they can enforce against the defendants ?

The discounting of the notes in 1825, and the receiving the assignment of the mortgage, were acts which the legislature had prohibited to this corporation. They were therefore unlawful. But it is said that these defendants have no right to object ; the sovereign power of the state has never interfered, and the original debtors to the corporation, instead of striving to avoid their obligations, sought to pay them by this assignment. The cases cited in support of this view, were those in which the forfeiture of corporate franchises was set up to defeat a recovery, or in some other mode, the continued existence of the corporation was questioned collaterally.

This is not such a case. It is not denied that this corporation was in existence, and could maintain suits till 1836, although its charter might have been forfeited at the instance of the people, many years before.

The question is, whether the corporation obtained any title to this mortgage. The objection to their title, is not that they had forfeited their charter, but that the title was obtained by a positively illegal act.

I confess that I cannot perceive any escape from the objection. The title of the complainants was open to be contested by the defendant. When it is proved, it turns out that it was obtained by taking a transfer, which the law had expressly prohibited. I do not see how a valid title can be made by such an illegal transfer. And in order to enforce these securities, this court must lend its powers in aid of a direct violation of law.

That cannot be permitted ; and the result is that the complainants, standing in the place of the Utica Insurance Company, are not entitled to enforce the bond and mortgage in question.

This conclusion renders it unnecessary for me to look into the question as to the competency of Mr. Clark as a witness, or any of the other points which were so fully and ably discussed at the hearing.

The bill must be dismissed with costs. One of the receivers from his long connection with the company, commencing in 1824, must have known of the vote in 1819, and the subsequent

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closing of its affairs, and is thus chargeable with notice, that the whole proceeding in discounting Russell Clark's notes, and its sequel, were in violation of the act of incorporation. The complainants on this ground, without regard to others that might be mentioned, must pay costs.

CARTER v. BLOODGOOD'S EXECUTORS and others.

A testator having a son and five daughters, all infants, gave the residue of his estate to trustees, with directions to pay the annual income to his six children in equal proportions during their lives, and at the death of either of them without lawful issue, his or her share to continue as a part of the residue, the income of which was to be equally divided among the *surviving children*; and if either of his children should die leaving issue, his or her share should be equally divided among his or her children. One daughter died without issue, then another died leaving one child, a son, and then two other daughters died without issue;

Held, that the words *surviving children*, were to be construed "*other children*," and that the son of the deceased daughter was equally entitled to share with the testator's surviving children, the proportions of the daughters who died after the decease of his mother.

The word "survivors" may be construed "others," upon the context and the other clauses of the will, showing the intent of the testator.

And the court will supply words to support the intent, when that is apparent upon the whole of the will taken together.

In the principal case, the bequest over to the grand-children, in the shares of the children who died without issue, whether before or after the death of the parents of such grand-children, is raised by implication from the testator's general intention.

A decision on a point of law, in a former case, between the same parties in the same court, is not an estoppel, or conclusive; but it is binding upon the same court, though held by another judge, unless the latter be clearly and strongly convinced of its error.

November 15, 1845; February 21, 1846.

THE bill was filed in May, 1844, by James Bloodgood Carter, an infant, by his father as his next friend, against Thomas Tom Bloodgood and Lindley Murray Moore, surviving executors of James Bloodgood, deceased, and Frederick J. Goodwin and Catharine T., his wife. The bill stated that James Bloodgood, on the

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10th of October, 1826, made his last will and testament with all the formalities required by law ; and thereby, after giving a legacy of \$2500 to each of his five daughters on their attaining to lawful age, and \$5000 to his son Thomas T., on his attaining to lawful age, and \$5000 more when twenty-five years of age, he directed as follows : "Seventhly. I order and direct my executors to place out all the residue of my estate, either in good mortgage security, or invest it in the public funds of the United States, or in those of the state of New York, and to pay the annual income and interest arising therefrom, in yearly or half-yearly payments, as my executors may see fit, to my five daughters, Catharine Tom Bloodgood, Anna Lawrence Bloodgood, Mary Titus Bloodgood, Sarah Tom Bloodgood, and Susannah Bloodgood, and my son Thomas Tom Bloodgood, in equal proportion during their natural lives ; and at the death of either of them without lawful issue, his or her share is to continue to be a part of the residuary estate, the income of which is to be equally divided among the surviving children ; and in case either of my children should die leaving lawful issue, his or her part shall be equally divided amongst his or her children, and if in minority, to their guardians, legally constituted and appointed."

That the testator died, October 18th, 1826, leaving surviving him the six children named in the will, all of whom were minors. His estate at his death, was about one hundred thousand dollars.

Sarah, one of his daughters, died March 13th, 1835, while under age, unmarried, intestate, and without issue.

Mary, another daughter, was married, November 10th, 1836, to William Henry Carter. The complainant, the only issue of the marriage, was born August 19th, 1837, and his mother died intestate, April 20th, 1839.

Frederick J. Goodwin married Catharine, another daughter, May 8th, 1838 ; and Joseph King married the testator's daughter Anna, on the 1st of April, 1839. The remaining daughter, Susannah, died April 30th, 1840, intestate, unmarried, without issue, and an infant.

Robert Carter was appointed administrator of Mrs. Mary T.

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Carter, and in November, 1840, with the complainant, filed a bill in this court, against the executors of James Bloodgood, and his surviving children, together with F. J. Goodwin and J. King; insisting that the complainant was entitled to one equal fourth of the testator's residuary estate.

The executors put in an answer, denying his right, and the cause came on to be heard before the Hon. Murray Hoffman, Assistant Vice-Chancellor, who made a decree on the 23d of December, 1841, directing the accounts of the estate to be taken. And afterwards on the 13th of March, 1843, on the master's report, he made a further decree, establishing the complainant's right to the one-fourth part of the residuary estate.

That in October, 1843, the testator's daughter, Anna L. King, died intestate and without issue; and the complainant insisted that he was entitled to one equal third of the fourth part of the residuary estate, of which Mrs. King received the income while living. The bill insisted on the decision of the court in the prior suit, as establishing the complainant's right.

The defendant, Thomas T. Bloodgood, executor, &c., alone answered the bill, and admitting the facts charged; insisted that the complainant was not entitled to any portion of either the capital or income of the fourth part of the residuary estate of which Mrs. King received the income during her life; and submitted the question thereon to the court. He alleged that he was not a party in his own right, either in this suit or the former one.

M. S. Bidwell, for the complainant.

D. Lord, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The same question was presented in the former suit, that has been argued here, and the decree decides that question. It was however, a point of law, involving no contested fact, and this suit relates to other property. I am not prepared to say that the decree was an estoppel, or that it concludes the defendants from contesting the construction of the will, in another suit relating to a different share of the es-

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tate. But as a decision of the law upon the identical point, by this court on a former occasion, I feel bound to follow it, unless on examining the case I am clearly and strongly convinced that it was erroneous.

The defendants insist that by the will, the income of the testator's residuary estate is given to his six children collectively, and to the survivor of those children, the whole capital to remain in the executors, until the death of all his children. That on the death of each child of the testator, such child's proportion is given to its issue, as a legacy at that time. If such child leave no issue, its share goes to the testator's surviving children, excluding the issue of children who have died previously. And that the legacy to the issue of children, carries only the share or part of which the parent received the income at such parent's decease.

The effect of the defendants construction, applied to the events which have occurred, is this.

On Sarah T. Bloodgood's death in 1835, without issue, her sixth part remained in the residuary estate for the benefit of the five surviving children of the testator. On the death of the complainant's mother in 1839, the one fifth part of the residuary estate, vested in the complainant. When Susannah Bloodgood died in 1840, without issue, her fifth part continued in the residuum, for the benefit of the testator's three surviving children, excluding wholly the issue of Mrs. Carter; and so of Mrs. King's fifth part on her death, without issue in 1843. And thus the two survivors, Mrs. Goodwin and T. T. Bloodgood, are entitled to the income of four fifths of the whole residuary estate, during their lives, and their issue if they die leaving issue, will take four fifths of such residue absolutely, leaving the other fifth to the complainant. If Mrs. Goodwin die before her brother, he will then take the income of the whole estate during his life, and if she die without issue, his children on his death will have four fifths of the property, and the complainant one fifth.

The construction insisted upon in the answer, (which goes further than was contended at the hearing,) will be further illustrated by supposing a different state of things which might have oc-

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curred. If Thomas T. Bloodgood had died in 1839, before either of his sisters, and had left issue four children, and then all the sisters had died, save Mrs. Carter; Mrs. Carter would at this time have had the whole income of the estate, and continued to enjoy it during her life, which might have continued twenty years. At her death, her son would take five sixths of the estate absolutely, and the four children of T. T. Bloodgood, after having gone through their entire minority, without any income whatever, would then jointly take the remaining one sixth.

I should mention, that the actual result has been varied, by the decree in the former suit, as to the shares of Sarah and Susannah; but that decree was contrary to the construction claimed. The statement of the effects of the will, when thus construed, operating upon the contingency of one or the other, of the testator's children dying before the rest, and leaving issue, must satisfy every person who reads this will, that such was not the intention of the testator.

[In the various specific legacies which he gave to his children, in the previous portions of the will, he evidently made all the distinction, and indulged all the partiality, which he intended to make or exhibit, amongst the different branches of his family.] [The residuary clause makes no distinction whatever.] [The grossly unequal distribution which might ensue from the defendant's construction, is the work of chance] and the distressing consequences might as well have been visited upon the family of the testator's only son, as upon the issue of either of his daughters. [The residuary clause shows that he had the issue of his children in view, and that he intended to provide for them without any distinction, or preference, except the natural one, that the issue of each of his children, whether more or less numerous, should receive their parent's share.]

I think that the true construction of the will, does not sustain the defendants claim. The words "surviving children," are mainly relied upon, to exclude the complainant from any participation in the shares of those of his aunts who have died since his mother's death. And it is not to be denied, that the literal signification of those words, leads directly to that result.

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Mr. Powell says, it is now settled, after some fluctuation of authority, that where property is given to a plurality of persons, with a devise or bequest over in certain events, of the shares of dying objects to the survivors, the word "survivors" is construed *others*, so that as well those who die before, as those who survive the objects in question, are entitled; provided of course, that their deaths did not happen under circumstances, which subjected their shares to the operation of the limitation over. And he puts the case of a bequest over to the survivors, on one dying under twenty-one years of age; the share of one so dying, he says, will vest in the persons surviving, and in the representatives of those who have previously died, after having attained that age. (2 Powell on Devises, by Jarman, 723.)

Such was the decision, by Lord Eldon, in *Wilmot v. Wilmot*, (8 Ves. 10,) and it has the sanction of Sir William Grant's opinion expressed in strong terms, in *Barlow v. Salter*, (17 Ves. 482.)

In *Harmon v. Dickinson*, (1 Bro. Ch. Ca. 91, and note 1,) which is cited as supporting this doctrine, the bequest was to two persons, and when the second died without issue, there was no person answering the description of "survivor," except the children of the other legatee, who had died previously. This must have been the ground of Lord Thurlow's decision, because in the same year, (1781,) in *Ferguson v. Dunbar*, (3 Bro. Ch. Ca. 469, note,) where under a similar will, there was a surviving legatee, as well as children of one who had died before the legatee whose share was in question, he decreed the whole to the surviving legatee. The case of *Aiton v. Brooks*, (7 Simons, 204,) was like *Harmon v. Dickinson*, in the circumstance above stated.

On the other hand, in *Crowder v. Stone*, (3 Russell, 217,) the bequest after two life interests, was to the testator's nephew, and four nieces equally, but in case of the death of either of them without lawful issue, before their shares became payable, then the share of such decedent should go to, and be equally divided, between and amongst the survivor and survivors of them, share and share alike. M. one of the nieces, died in 1797, leaving issue, and another niece G. died, in 1802, without issue. Lord

Lyndhurst held that the representatives of M. took no interest in the share of G. (And see *Winterton v. Crawford*, 1 R. & Mylne, 407; *Ranelagh v. Ranelagh*, 2 M. & K. 441; and *Leeming v. Sherratt*, 2 Hare, 14.)

Indeed, Mr. Jarman, in his recent valuable treatise on wills, says the rule is now settled, that the word "survivors" when unexplained by the context of the will, must be interpreted according to its literal import. (2 Jarm. on Wills, 609, 619.) And this seems to be the result of the English authorities.

[T]ested by this more restricted rule of construction, I think the context, and the other provisions in the will of Mr. Bloodgood to which I have already referred, do explain the meaning of surviving children, in this clause of the will, to be "the others;" that is, his own children living, and the children of his deceased children. And that he intended by his residuary bequest, to put each branch of his family, on a footing of exact equality, giving life interests to his children, and the capital to their respective issue, *per stirpes*.

The bequest over to the grand children, in the shares of the children who die without issue, is raised by implication, from the same provisions in the will, which establish the testator's intention to make an equal distribution of the residue. (See 1 Jarm. on Wills, 499, 500.)

There is another rule in the construction of wills which leads me to the same conclusion.

[T]he governing principle, is the intention of the testator, and when that is apparent upon the whole will taken together, the court must give such a construction, as to support the intent, regardless of grammatical rules, and sometimes by supplying words and limitations.] As instances of inserting words in order to equalize estates, where the testator has expressed uniformity of purpose, thereby effectuating the intention, as collected from the context, I refer to *Langston v. Pole*, (2 Moo. & Payne, 490,) and *Doe d. Wickham v. Turner*, (2 Dow. & Ryl. 398.)

In *Pond v. Bergh*, (10 Paige, 140, 152,) the testator devised certain lands to his son Abraham, other lands to his son Philip, and other portions to his five daughters, and he gave some lands to the two sons jointly. His will then provided, that if one of

his sons, or if both of them, should die without issue, the testator thereupon gave the part or share, so devised unto either of them, unto the *surviving son*, and the five daughters in equal portions forever. And if both the sons died without issue, their shares were to go to the five daughters. Philip survived the testator fifty years, and then died without issue; Abraham and the five sisters, having died in Philip's life time, leaving issue. The question was whether Abraham's issue should inherit one sixth of Philip's share. The Chancellor, on the evident intention, derived from the will, held that they should; and construed the will, as if the words "or the son who has died and left issue, who are then living," had followed the words "unto the surviving son" in the will itself.

[These authorities warrant me in construing this will as if the words "and the issue of such of my children as are then dead, such issue taking their parent's proportion," had followed the expression "surviving children," in the clause in question. This gives effect to the undoubted intention of the testator, as it is exhibited by the whole will, and does no injustice to any of the objects of his regard; and I adopt it without hesitation.]

The former decree accords with the result of my examination of the bequests, but I am not informed of the particular grounds upon which it proceeded.

As to parties, my impression is, that Thomas T. Bloodgood ought to have been a party in his individual as well as his representative capacity, and that the other grandchildren of the testator, if any there be, should also have been parties.

The bill may stand over to make these persons parties, and the question of costs will be reserved. If the complainant desire it, there may be a declaration of his rights, as against the executors and the other defendants.

HANLEY, Trustee, &c. v. CARROLL and others.

WHERE two successive mortgages were executed to a married woman, on premises in which she had a right of dower, and were afterwards assigned by her and her husband to the trustee of her separate estate, previous to which, and before the second mortgage was given, she and her husband entered into possession of the premises, and continued in possession until the trustee proceeded to foreclose the mortgage ;

Held, 1. That the husband before the assignment, was the mortgagee, *jure mariti*, and thus became mortgagee in possession.

2. That no notice of the assignment being given to the owner of the equity of redemption, the latter was entitled to treat the husband as mortgagee in possession, during the whole period.

3. That the clear rents and profits which the husband received, or ought to have received, must be applied to the reduction of the mortgage debt.

Where a mortgagee, having a right of dower in the lands mortgaged, enters into the lands after the money is due, the entry will be deemed to have been made as mortgagee.

The revised statutes relative to Uses and Trusts, do not apply to a marriage settlement of personal property creating no future interests.

February 14 ; February 28, 1846.

THE bill was filed, January 16th, 1845, by Henry Hanley, as trustee of the separate estate of Eleanor Pinkerton, a married woman, against James Carroll an infant, Pinkerton and wife, Ann S. Bond, and others. The facts were as follows :

Eleanor P., formerly Carroll, with her husband James Carroll, executed a mortgage to Ann S. Bond, on a house and lot in the city of New York, of which Carroll was seised. This was the first lien on the premises, and was undisputed. This James Carroll died in 1834, leaving a son James, his only heir at law. In 1838, Eleanor, the widow of the deceased, was married to Pinkerton, having first executed with him, an ante-nuptial contract providing for her separate use and control of her property, in which the complainant Hanley, was the trustee. On the 9th of August, 1841, James Carroll executed a mortgage on the house and lot, to Eleanor Pinkerton ; and on the 14th of September, 1843, he executed to her another mortgage on the same premises. Previous to this, and in 1843, Pinkerton and his wife

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entered into the possession of the house and lot, and occupied the same from thence until the hearing of the cause. On the 20th of September, 1844, Pinkerton and wife assigned the two mortgages of James Carroll, to the complainant as trustee. In May, 1844, James Carroll the second, died intestate, leaving the defendant James Carroll, an infant, his only heir at law.

The guardian *ad litem*, of the infant, set up in his answer, that Mrs. Pinkerton had been in possession and received the rents and profits ever since the death of her first husband, and insisted, that the amount of the rents should be set off against the two mortgages held by her trustee.

The cause was heard on the pleadings and proofs.

J. T. Brady, for the complainant.

The complainant is entitled to the usual decree, referring it to a master to compute the amount due on the several mortgages in the bill of complaint mentioned, and for a sale of the mortgaged premises, &c.

The matter of defence set up in the answer of the guardian *ad litem* of the infant defendants, is inadmissible in this suit because,

1. The remedy is perfect, (and exclusively,) at law.
2. The personal representatives of the deceased James Carroll, and not his heir at law, are the proper parties to demand the account prayed for.
3. The claim proposed to be set off is unliquidated, and cannot be ascertained by calculation. (2 R. S. 103, § 43, 278, § 32.) It is not therefore a proper subject of set off to the mortgages. (*Jennings v. Webster*, 8 Paige, 503; and see *Chapman v. Robertson*, 6 *ibid.* 629; *Holden v. Gilbert*, 7 *ibid.* 211.)

4. It is not against the complainant in this suit, but against one of the defendants. It is Pinkerton's sole liability. The *cestui que trust* is not liable for the rents. Her separate estate might just as well be subjected to any other debt of his.

In no event, can the infant claim the rents and profits of the premises, prior to the death of his father.

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E. C. Benedict, for the infant defendant.

1. The conveyance to Hanley for the use of Eleanor Carroll, in 1838, vests no estate in Hanley whatever. The estate is in Eleanor, and the suit should be in her name. (1 R. S. 727, §§ 47 and 49.) At all events, Hanley took the mortgages after the death of J. Carroll, subject to all the equitable rights of the infant.

2. The two bonds and mortgages were made to Eleanor while she was in possession, and receiving the rents and profits. She was thus and is still, a mortgagee in possession, and cannot have a sale or foreclosure till an account is taken. It is to be deemed her possession, and not her husband's. The mortgage was her estate, and also the dower right. It is not a case of set off, properly so called.

3. She has been thus in possession nine years; the rents at \$500 a year amount to \$4500. She was entitled to her dower, one-third, which would still leave \$3000, which is more than the amount of her mortgages. Under such a state of things, the infant ought not to lose his land, till his rights are ascertained.

THE ASSISTANT VICE-CHANCELLOR.—As a trust of personal estate, the marriage settlement was doubtless valid, and entitles the trustee to hold the mortgages under the assignment. The statute relative to Uses and Trusts, is not applicable to this portion of the property vested in the trustee. As to the dower interest, there is not sufficient appearing in the case, to enable me to say whether the settlement is valid to transfer it or not. And it is not important to determine it in this stage of the cause. All the persons entitled to it in any event, are parties, and their rights may be ascertained on the reference as to the surplus.

The infant's claim to have the rents and profits applied to the complainant's mortgages, proceeds upon the ground that Pinkerton and wife are to be treated as mortgagees in possession, and not upon the idea of a set off.

When Mrs. Pinkerton resumed the possession of the premises, in 1843, her husband, *jure mariti*, was the mortgagee. The assignment to Hanley, it is true, recites that the mortgage monies

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were a part of the trust, but the recital is not proof of the fact, nor is there any evidence upon the point. Mrs. P. was not entitled to the possession in her right as widow of the first James Carroll, and there is no pretence of her husband entering as a tenant of the second James. The law, presuming that her husband entered rightfully, rather than by *disseisin*, necessarily refers that act to his being mortgagee, and the debt due to him being in arrear.

As mortgagee in possession, he is bound to account for the rents and profits.

It was urged that this claim for the rents, is valid against Pinkerton only, and not against his wife or her trustee. But Pinkerton was the mortgagee at the time of the entry, and until the assignment of the mortgages to Hanley, on the 20th day of September, 1844. When the second mortgage was executed to Mrs. Pinkerton, she and her husband were in possession, and in respect of that mortgage, he immediately became the mortgagee in possession, and so continued.

The question then arises, did he lose this character on assigning the mortgages? I think he did not, in respect of the heir of the mortgagor, for the reason that no notice of the assignment was given to his guardian. When James Carroll the second died, the guardian of his infant heir on inquiry, would have found Pinkerton in possession as mortgagee. He had a right to presume a continuance of his possession in that capacity, until notified to the contrary. And it was the duty of the trustee to give such notice, on taking the assignment, if he intended to decline applying the future rents upon the mortgages. The guardian of the heir, on being apprised of this intention, would have exacted rent from the Pinkerton's, or put them out of possession.

The trustee took the mortgages subject to the accounting for the profits received by the mortgagee while in possession, and his omission to give notice, subjects him to the continuance of that accounting to the present time.

In regard to Mrs. Pinkerton's occupation of the premises prior to the mortgages, it is an affair which belongs to the administrator of James Carroll the second. The infant has no interest in it as heir.

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The decree must provide for an account of the rents and profits from the entry of the Pinkerton's, in 1843. From the gross amount of such rents, the master will deduct the repairs, taxes, and insurance, and the accruing interest on the prior liens, (which affect Mrs. P.'s dower, as well as the inheritance.) One third of the residue, he will allow for Mrs. Pinkerton's dower right; and with the exception of such third part, and the disbursements actually made by her, the trustee, or her husband, upon such accruing repairs, taxes, interest and insurance, he will credit the whole of the gross rents and profits upon the complainants mortgage debt, in such mode as may be just in respect of interest, and the time of making the application.

The question of costs and other directions, must be reserved, until the coming in of the master's report of the amount due on the complainants mortgages.

M. E. and E. H. GREEN v. STORM and others.

THE court of chancery is as much restricted as any other court, to the issues made by the pleadings; and while it endeavors to avoid technical and narrow grounds of objection, it cannot, without losing sight of essential principles, admit evidence of a different case from that pleaded.

There is a wide distinction between a payment and a set off; and under an answer setting up *payments* made towards a mortgage debt, evidence of corresponding sums due from the mortgagee to the mortgagor, which might be *set off*, is inadmissible.

There is no rule of law, which will apply distinct debts due from and to the same parties as a payment of each other, unless by the assent of both parties, or upon proof of facts from which such assent is clearly inferrible.

A course of dealing between parties, sometimes entitles two partners to set off their joint demand against the debt of one of the partners.

Complainants succeeding in a foreclosure suit, excluded from recovering costs unnecessarily incurred.

In a foreclosure, where one of three mortgagees died pending the suit, which was revived and proceeded in the name of the survivors, without any objection being made until the hearing, the court made a decree of foreclosure and sale, with suitable provisions to protect the rights of the legal representative of the deceased mortgagee, the complainants also undertaking to give effect to such rights.

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Form of the provision for that purpose in the decree; Note *a*, at the end of the case.

December 13, 19, 20, 1845; February 27, 1846.

THIS was a foreclosure suit, commenced on the 8th of March, 1844, by the complainants and their mother, Mary Green. The bill was amended in August following, after the death of Mary Green. Besides the mortgagors, Hugh O'Daniel, a subsequent mortgagee; Gershom Sellick, a receiver in a judgment creditor's suit against S. Storm, the mortgagor; and other incumbrancers, were made defendants.

The facts ascertained by the court, so far as they were deemed important, may be thus stated:

Samuel Storm and wife, in 1831, mortgaged the premises in question, to Timothy R. Green to secure \$2500, advanced to him by Green, and for which he also executed his bond. The original complainants insisted, that the money loaned belonged to them; T. R. Green, who was a son of Mary Green and the brother of Mary E. and Elizabeth H. Green, being their agent and banker for many years prior to his death, which occurred in April, 1840.

It appeared that T. R. Green indorsed on the bond, as of its date, that it belonged to his mother and sisters; and he executed a formal declaration of trust to that effect, dated October 3d, 1835. It was not distinctly proved that Storm was informed of this trust, or of the complainants ownership, during the life of T. R. Green.

Mr. Green was the attorney and counsel of Storm, and transacted a considerable professional business for him, in a part of which, his brother-in-law, John W. Mitchell, was interested as his law partner. This business led to mutual accounts between Storm and T. R. Green, and between Storm and Green & Mitchell.

It was claimed by the defendants who answered, that in the course of these dealings, T. R. Green became accountable to Storm for three sums of money, which the latter was entitled to have applied towards the satisfaction of his mortgage. No credit had been given for either of them, and the complainants resisted their application on several grounds. One of these sums was

\$288 75, alleged to have been received by T. R. Green for Storm, from S. Swartwout, January 5, 1837. Another was \$1000, which Storm deposited with T. R. Green, in 1836, as indemnity for his becoming surety for Storm in a bond on a writ of error, prosecuted by the latter to the court for the correction of errors, in a suit against J. Westervelt. It was claimed that the suit was determined in December, 1837, and the bond given up. The testimony on this point was not entirely clear, as will be seen on referring to the judgment of the court. The remaining sum was \$156 50, paid to T. R. Green in February, 1837, for rent of the premises in dispute in the Westervelt suit, and which was to await the event of that suit.

On the other hand, the complainants proved a large amount due for costs and counsel fees, from Storm to T. R. Green, and to Green and Mitchell, accruing during several years prior to Green's death, as well as to Mitchell subsequently; and they procured a great number of the bills of costs, to be taxed, and took testimony very much at large, to prove these demands.

Storm and wife on the 29th of December, 1838, mortgaged the premises to O'Daniel, to secure \$850, then loaned to him. O'Daniel in his answer stated that Storm then represented to him, that only \$902, was due on the Green mortgage; and he alleged that sundry large payments had been made at different times by or in behalf of Storm to Green, or for his use, on account of the principal and interest of Green's mortgage, over and above those credited by the complainants.

The defendant Sellick, in February, 1844, was appointed receiver of Storm's effects, and by his tenant, was in possession of the mortgaged premises. In his answer, he set forth, that T. R. Green received sundry payments and sums to be applied on the mortgage, besides those admitted by the complainants. Both of these defendants insisted that T. R. Green was the owner of the mortgage, and had so acted during his lifetime. The other defendants suffered the bill to be taken as confessed.

After the death of T. R. Green, Mrs. Mary Green as his executrix, transferred Storm's bond and mortgage to one Bassett, by whom it was assigned to the three original complainants, before the bill was filed. After the death of Mrs. Mary Green, an order

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was entered, dated July 16, 1844, reviving the suit, and directing it to proceed in the names of the surviving complainants. At the hearing, it was objected that her interest did not survive, and the suit was therefore defective ; to meet which the complainants offered to read letters testamentary on her estate, to Mary E. Green as sole executrix, and to connect her as such with the suit, in any mode the court might deem proper.

W. Silliman, for the complainants.

E. H. Seely and *W. A. Seely*, for the defendant, O'Daniel.

G. Buckham and *E. Sandford*, for Sellick, receiver, &c.

THE ASSISTANT VICE-CHANCELLOR—The objection made to the complainants paper title to the mortgage set forth in the bill, is obviated by the production of the letters testamentary issued to Mary Green. This makes the legal title to the mortgage complete in the three complainants who filed the bill originally.

The question as to the abatement of the suit by Mrs. Green's death, during its pendency, so far as her third part of the mortgage is concerned, was first made at the hearing ; and upon the surviving complainants, undertaking to give effect to the rights of her legal representative, (such rights in no manner affecting the defendants,) the defect may be cured by a suitable provision in the decree. (*Harvey v. Cooke*, 4 Russell, 34 ; 1 Daniell's Ch. Pr. 389, 390.)

As to the trust in the mortgage money, which is claimed to have existed from the inception of the mortgage, I find no satisfactory evidence, that the mortgagor was informed of it, during the life of T. R. Green ; and I will first examine the case, as if this bill were filed by the executrix of T. R. Green, to foreclose the mortgage as a part of his estate. Before doing this, I will remark that under any aspect of the case, I do not discover any design to defraud, or any wrongful proceeding in reference to the mortgage, or its ownership. If T. R. Green were a trustee, as is insisted by the complainants, it was highly proper for him to provide for the contingency of his death, by indorsing upon or

attaching to the securities, some written testimonial that they were not his own property; and he may well have deemed that it was a matter of entire indifference to the mortgagor, whether the debt belonged to him, or to his mother and sisters, so long as the proper credits were given upon the mortgage. And although the complainant's title under the trust, may have been sufficient to have foreclosed the mortgage in equity, without an assignment, yet their legal title was defective, and it is no impeachment of their equity, that it was deemed prudent to unite both by an assignment. I am not to presume that they or their legal advisers were so ignorant of the law, as to suppose that the formal assignment would impair or alter any prior rights or equities of the mortgagor, or of those claiming under him.

The defence set up in both of the answers is the same. The defendants deny that the whole principal sum is due on the mortgage, and they charge that sundry large *payments of money*, have been made at different times by the mortgagor to T. R. Green, or to some one for his use, *on account of the principal and interest of the mortgage*, besides the payments admitted in the bill. They are ignorant of the particulars and amounts of such *payments*, but one defendant believes they exceed \$1500, and the other is informed that they will reduce the amount due on the mortgage to \$900.

Now the whole controversy in this respect arises upon testimony, not of payments on account of the mortgage, but of three sums of money, which came into the hands of Mr. Green, from the mortgagor, and which it is claimed the latter had a right to set off against the mortgage. Two of those sums, so far from being a payment on the mortgage, were paid to Mr. Green for entirely different purposes. But the defendants insist as to all these sums, that they remained in Green's hands, after the object for which they were placed there had been accomplished, that Green was thereupon liable to account for the same to the mortgagor, and therefore the law applies the same to the bond and mortgage.

There is a wide distinction between a payment and a set off, and I am not aware of any rule of law which will apply distinct debts due from and to the same parties, as a payment of each

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other, unless by the positive assent of both parties, or by proof of a state of facts, from which such assent is clearly inferrible. In this case, neither of these things exist. There is an attempt to imply an assent or acquiescence on the part of Mr. Green, but the inference is fully rebutted by the existing and increasing indebtedness of Storm the mortgagor, to Green and to Green and Mitchell, on simple contract. It is not to be presumed that he would apply these moneys on a mortgage debt, while his sole and partnership claims against Storm, were unpaid, and accumulating. The inference is also repelled, as to the largest sum, by the fact that it was paid to Mr. Green, in a suit pending or about to be commenced, and which went to the court for the correction of errors; and no lawyer would be likely to apply that money to any purpose, after the suit was disposed of, until his costs and charges of the litigation were paid.

To test further the defendant's claim that these were payments, suppose that Storm, after the Westervelt bond was given up, had sued T. R. Green, for the \$1000, deposited; and Green had pleaded the general issue or payment, relying upon the production of Storm's bond and mortgage, and the application of the sum as a payment on the same. His defence would have failed beyond all doubt, upon Storm's proving that the \$1000, was deposited for a special purpose which had been accomplished, and which had no connection with the bond and mortgage. In such an action, nothing short of a plea or notice of set off, would have enabled Green to avail himself of the bond and mortgage as a defence.

It is thus very apparent that the defendants in this suit, have not set up in their answer, the defence to which their testimony is directed. This court is as much restricted, as any other, to the issues made by the pleadings; and while it endeavors to avoid technical and narrow grounds of objection, it cannot without losing sight of essential principles, admit evidence of a different case from that pleaded. It cannot allow one who has pleaded a set off, to prove a payment, any more than it can permit evidence of a trust, to substantiate a charge of fraud. In *Roosevelt v. The Bank of Niagara*, (Hopk. R. 579,) affirmed on ap-

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peal, (9 Cowen, 409,) the demand of the mortgagor was allowed as a set off, in express terms, and it was claimed in that form.

I must decide against the defence, assuming it to have been proved as it was claimed at the hearing.

In reference to the costs, as to which a distinct point was made, it is necessary to look into the testimony to the extent of ascertaining the propriety of the course pursued in the examiner's office.

The first item claimed in the defendants proofs, is \$288 75, received by Mr. Green for Storm, of Samuel Swartwout in January, 1837. There is no direct testimony that Green received this, but the defendants seek to infer it from a statement made by him, in which he charges himself with the principal sum of \$4500, on which the \$288 75, was the interest, and it was payable in and by the same security with the principal. But this inference fails, because the statement being the only evidence, that he received any part of it, cannot be stretched to cover any more than it admits. The more just inference from Swartwout's testimony, and the statement is, that Storm himself received the \$288 75.

Next is \$1000, which Mr. Green retained out of the Swartwout fund, "as security against his signing Storm's bond, to J. Westervelt sheriff, to be retained (by Green,) until the event of Sears's application."

On this subject, the proof is very defective. A paper is made an exhibit, which purports to be this bond, but its execution is not proved. The offer to deliver it to the complainants, was therefore nugatory. Westervelt's testimony is open to the objection, that no bond was identified or produced to him.

If these difficulties were overcome, there is no evidence to fix the time when the bond was discharged. I was referred to the report of the case of *Westervelt v. The People, ex rel. Sears*, (in 20 Wend. 416,) as showing that the suit terminated late in December, 1838. But this would not establish that Mr. Green was exonerated from that bond in his lifetime; while it does show, (if it be proper evidence in the cause,) that in respect of this \$1000, no right of set off existed in Storm, when he gave his mortgage to O'Daniel.

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The testimony on the other side, proves that Mr. Green, alone and together with his law partner Mr. Mitchell, had a large account against Storm, for professional services. Under these pleadings, it was not necessary to prove the extent or the particulars of these demands. It appears that in the settlement of the Swartwout money, and in an account rendered apparently in May, 1838, the demands of Green and Mitchell were brought in by Mr. Green, in his accounting with Storm, and the paper last mentioned, shows that Green and Mitchell were Storm's lawyers in the case of *Sears v. Westervelt*. I think it will be found upon a full investigation, in connection with these circumstances that there has been such a course of dealing between Storm and Green and Mitchell, that the latter were entitled to set off their joint demands against either of the items of account, which have been introduced in favor of Storm against Green. (See *Vulliamy v. Noble*, 3 Merivale, 593, 617, 618, 621.)

The last item is \$156 50, received by Green in February, 1837, from the tenant, for the rent of the leaseholds in controversy in the *Westervelt* suit, to be held by him subject to an arrangement between Storm and the tenant. I cannot find any evidence in the case, which shows that Storm ever became entitled to receive this money.

Upon the whole, there was no good cause for the complainants to go into the testimony of Mr. Green's, or of Green & Mitchell's demands against Storm, beyond the point of showing that they conducted suits for him, and in general, the character and extent of the services. And there was no cause for bringing forward the demands which were Mr. Mitchell's exclusively. Their costs of the suit must be restricted accordingly.

They are entitled with this limitation, to the usual decree for the foreclosure and sale of the mortgaged premises. The decree must provide for the payment of one-third of the mortgage debt, to the legal representative of Mrs. Green.(a)

(a) The provisions of the decree on this subject, were as follows :

It declared that two-thirds of the mortgage debt belonged to the complainants, and the remaining third part to the executors or administrators of the former complainant, Mary Green, deceased. It directed a reference to a master, to compute and ascertain the amount due to the complainants, and to the legal representatives

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Much was said of the hardship of this case on Mr. O'Daniel, but surely there is no just cause for it. He knew of the mortgage to Mr. Green; and as a man of ordinary prudence, he should have applied to Green, instead of trusting to Storm's representation, as to the amount due on the mortgage.

JACKS and others v. NICHOLS.

A resident of Savannah being in New York, with funds which he had just remitted from S. at an expense of nine per cent. for exchange, loaned the same in N., stipulating for seven and one-half per cent. of the exchange so paid by him, besides legal interest.—*Held*, that the transaction was usurious, and that a succession of notes given in renewal, were also void for usury; and the last in the series were ordered to be delivered up and cancelled.

A prior remittance of the money loaned, from another state or country, not expressly for the purpose of the loan, furnishes no valid pretext to charge the borrower with the charges of such remittance, in addition to interest.

There is an intent to take unlawful interest, within the meaning of the statute, when more than seven per cent. is reserved, although the lender took the surplus under a mistaken idea that he had a right to charge the borrower for expenses or trouble.

The taking of a separate security for the interest and the excess, does not aid an usurious loan; nor is it material, that no part of the unlawful interest was ever paid.

of Mary Green upon the bond and mortgage in question. After the usual directions for a sale of the mortgaged premises, to pay the whole debt and costs, the decree provided that the master should pay to the complainants their costs, and the sum reported due to them on the bond and mortgage, not exceeding however, two-thirds of the net proceeds of the sale; and should pay the sum due to Mary Green's estate, (not exceeding the other third of such net proceeds,) to her executors or administrators, on their producing to him letters testamentary, or of administration on her estate, from the surrogate of the county of New York, and leaving with him a copy thereof, to be filed with his report. If no evidence should be produced to the master, on behalf of the legal representatives of Mary Green, to entitle him to pay them the proceeds of the sale as before directed, the master was required to bring into court and deposit with the clerk, the share of such proceeds belonging to her estate. In the event of a deficiency, an execution was to issue for the complainants, in behalf of themselves and Mary Green's legal representatives.

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Where the last renewal of a series of usurious notes originating here, was made by the parties, residing in this state, signing the new notes and securities here, (the former being payable here,) and receiving here the notes given up, the contract is to be deemed as made here, and governed by our laws, although the new notes were delivered to the lender in another state, where he was temporarily residing.

Semb. the same law would govern, if the renewed notes had been made and delivered at the lender's residence abroad; there being no new loan, but simply a continuation of the original loan for a further period.

A creditor provided for in an assignment, is not a competent witness for the assignee in a suit to avoid a transfer of property made by the assignor.

December 13, 1845; February 25, 1846.

THE bill in this cause was filed, October 10th, 1844, by Pulaskee Jacks and Hamlet Jacks, lately partners in New York, and by Jesse D. Price, as assignee under a general assignment for the benefit of creditors, against David B. Nichols, to compel the latter to deliver up to be cancelled, sundry promissory notes, alleged to be usurious, and to surrender the collateral security thereto.

The facts as shown by the pleadings and testimony, were as follows:

P. & H. Jacks were engaged in importing and manufacturing watches and jewelry. Nichols residing in Savannah, Georgia, was in New York on the first of June, 1840, and at that time, agreed to loan to P. & H. Jacks four or five thousand dollars, for which they agreed to pay him interest at seven per cent. per annum, five per cent. exchange, and two and one-half per cent. on sales of watch movements, imported by them, with the money loaned.

In pursuance of that agreement, Nichols, on the 1st of June, 1840, advanced to them \$2000, and received their note for that sum, payable twelve months after date, and also their note for \$240, payable nine months after date. Both notes were payable to, and indorsed by William H. Jaques. The \$2000 was advanced in Nichols order on Young, Smith & Co., of New York.

On the 17th of June, 1840, Nichols advanced in a like order, to P. & H. Jacks, \$1792 36, and took from them three notes, one for \$1250, indorsed by George P. Shipman at twelve months,

one for \$542 36, at twelve months, indorsed by Jesse D. Price, and one for \$215 08, at six months, without indorsement.

P. & H. Jacks paid the notes for \$240, and \$215 08, respectively, when they became due; and on the 27th of May, 1841, they paid to Nichols \$61 73, for commissions on their sales of watch movements.

The moneys advanced by Nichols in June, 1840, had been remitted by him from Savannah in March and April preceding, at which time exchange between New York and Savannah, was from six, to eight and one-fourth per cent. against the latter.

Nichols stated in his answer, that the agreement for the five per cent. and the commissions, was to cover a part of his expenses in procuring exchange and remitting his funds to New York, which had cost him nine per cent.

The principal loan was renewed in June, 1841, on the terms of the borrower's allowing two per cent. for difference of exchange between New York and Savannah, and interest at seven per cent. Accordingly, P. & H. Jacks gave new notes to Nichols in this city, viz.: a note dated June 1, 1841, at twelve months, for \$2000, indorsed by S. Jacks and W. A. Woodruff; one dated June 19th, 1841, for \$1000, at twelve months, indorsed by Price; and one for \$792 36, of like date and tenor, indorsed by S. Jacks; and with the note of \$2000, P. & H. Jacks gave their note of the same date to Nichols, at nine months, for \$180, and with the two other renewed notes, gave him their cotemporary note at nine months, for \$161 31. The notes of June, 1840, were thereupon given up to the makers.

Just before the renewed notes fell due, a renewal of the same was negotiated with Nichols, and agreed upon, on the terms next stated; and the new notes were signed here, and with the security stipulated, were sent and delivered to Nichols at Bridgeport, Connecticut, where he was then staying. Upon such renewal, P. & H. Jacks made three notes, viz.: one dated June 1, 1842, at six months, for \$1000, indorsed by Price; and two dated June 18th, 1842, of which one for \$792 36, at nine months, was indorsed by S. Jacks, and the other for \$2000, at one year, was indorsed by S. Jacks and W. A. Woodruff; and for the interest on those notes, P. & H. Jacks gave their note to Nichols, dated

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June 4th, 1842, at about four months, for \$264 60. They also indorsed to Nichols, as collateral security for those notes, a note for \$5300, made by Tyler & Jacks of New Orleans, to P. Jacks & Co., at two years, dated February 9th, 1842. Upon this being completed, the three principal notes of June, 1841, were delivered up to P. & H. Jacks, at New York.

The note of \$1000, last mentioned, was renewed December 3, 1842, by a note of the same parties for \$1006 33, payable at thirty days; and that note was renewed at thirty days for \$1012 71, on the 5th day of January, 1843.

The bill charged that the indorsers had not been charged on any of the notes which were outstanding; but this was denied in the answer.

H. Jacks sold all his interest in the partnership of P. & H. Jacks, to P. Jacks in April, 1841; and on the 9th of May, 1843, the latter made an assignment of all his estate real and personal, including the note of Tyler and Jacks, to the complainant Jesse D. Price, in trust for the benefit of his creditors. By the assignment, W. A. Woodruff appeared to be a creditor of P. Jacks.

The bill prayed for an answer on oath; to have the outstanding notes of P. & H. Jacks declared void for usury and delivered up and cancelled, and to have the note of Tyler and Jacks restored to Price; and for an injunction in the meantime, restraining Nichols from parting with or collecting any of the notes.

The answer of Nichols stated the rate of exchange between New York and Savannah, and the expense of remitting his funds from the latter city; and that the allowances in 1840, in addition to the interest, were made to cover in part, that expense. He alleged that in 1841, he transmitted the whole loan then made (by renewing the notes,) from Savannah to New York, for the purpose, and actually paid three per cent. exchange thereon. And that he made the like transfer of funds in June, 1842, at an expense of two per cent. for exchange; and in the loan then made, he was allowed for his expenses of a journey to complete it, and one per cent. towards such exchange. He also insisted that the transactions in June, 1842, were all done at Bridgeport in Connecticut, and were not affected by the statute laws of this state.

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The complainants introduced W. A. Woodruff as a witness. The defendant objected to him on the ground of interest, but his deposition was taken, and at the hearing the defendant moved that it be suppressed.

The cause was heard on the pleadings and proofs.

J. M. Smith Jr., for the complainants,—cited 2 Cowen, 678. 709; 2 *ibid.* 769; 9 Mass. 55; 3 Bos. & P. 159; 5 Rand. 406; 13 Wend. 505; 2 Peters 327; 3 Halsted, 233; 9 Cowen 65.

B. W. Bonney, for the defendant, cited 23 Wend. 79; 6 Hill, 223; 9 Peters, 378; 19 Johns. 496; 4 Hill, 224; 4 *ibid.* 211, 219; 2 *ibid.* 635; 1 *ibid.* 227; 10 Paige, 94; 10 *ibid.* 109; 7 *ibid.* 581; 10 *ibid.* 326; 9 *ibid.* 478; Story's, Conf. of Laws, 201, s. 242; *Ibid.* 527, s. 637, 638; Cowen & Hill's Notes to Phill. Ev. 1136 to 1140; 8 Johns. 146, 189; 1 Paige, 220; 7 *ibid.* 615; 3 Dana, 495.

THE ASSISTANT VICE-CHANCELLOR.—The defendant's motion to suppress the testimony of William A. Woodruff, must be granted with costs. The assignee is prosecuting this suit for the recovery of the note of \$5300, made by Tyler & Jacks, and if he succeed, the fund in his hands will be increased accordingly. Woodruff is a creditor, whose debt is to be paid out of the assignment. His debtor is insolvent, and although he is a preferred creditor, there is no evidence that his debt will be paid without the aid of the note of Tyler & Jacks. He is therefore directly interested in the event of the suit; independent of the consideration, that he is an indorser of one of the notes which the bill impeaches as usurious.

The case itself is one of unmitigated usury. The loan was made in this city, in 1840, and the borrowers agreed to pay Mr. Nichols, for the use of the money, seven per cent. interest, five per cent. more under the denomination of "the exchange from Savannah," and two and a half per cent. upon all sales of watch movements made by them.

The money loaned was here. True it had been remitted to

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this city, from Savannah in Georgia some time before, and upon this fact the defence is founded. It is said that the charge of five per cent. was for "*fixing out the fund*," by transferring it from Georgia, in order to make the loan, exchange on New York at Savannah, being at the rate of nine per cent. premium ; and that the legality of the charge is sustained by the decision of the Chancellor, and the supreme court in *Suydam v. Bartle*, (10 Paige, 94,) and *Suydam v. Westfall*, (4 Hill, 211, 219.)

If it were material, I suppose it would be my duty to take notice of the fact as matter of history, that in 1840, the great price which exchange upon this city bore in Georgia, was occasioned by the refusal of the banks in that state, to redeem their circulation in specie. The funds paid there for the exchange, were irredeemable bank notes, which were at a discount of several per cent. from the specie standard. The funds payable here on the bills of exchange, were equivalent to specie. If Mr. Nichols had offered gold or silver in Savannah, for a bill of exchange on New York, he would undoubtedly have had it furnished to him at half the rate per cent. which P. and H. Jacks agreed to pay him for the use of his money, under the name of exchange from Savannah. Therefore if he had actually remitted the sums loaned from Savannah, in order to furnish it to P. and H. Jacks, it would not relieve him within the decisions to which his counsel referred.

But there is no foundation whatever for the charge of any exchange. Not only was the money already here, but it had been sent here without the slightest reference to this loan. The circumstance that it had come here from Savannah, made it worth no more to the borrowers. Even if it had cost the defendant twenty per cent. to bring it here, it would buy for him no more property after it arrived ; nor did our statute permit him for that cause to loan it at a greater profit than seven per cent.

As well might a merchant who had brought Mexican dollars from the interior of Mexico, at an expense of ten per cent. paid for insurance, freight and protection from robbers, insist on loaning them here, that the borrower should pay him those expenses in addition to the interest.

The case cited from 2 Hill, 635, (*Cayuga County Bank v.*

Hunt,) is not applicable. There the borrower from a country bank, wanting to use the loan in this city, instead of taking the notes of the bank which were equal to specie at its counter, or taking specie and remitting it, received from the bank a draft at sight on New York, for which he paid three fourths of one per cent. If he had brought the bank notes to New York, he would have been obliged to sell them at a discount equal to what he paid for the draft, and the transmission of specie would have been nearly or quite as expensive. The decision there was that the sale of the exchange was a distinct transaction from the loan, and of itself fair and reasonable.

The case is not aided by the giving of separate notes for the use of the money. It is one contract, and all the securities alike infected. Nor is it material, to show that any illegal interest was actually paid. The agreement to pay it is enough. It is admitted however, that the two first notes given for the interest and exchange were paid.

It is true that there must be an intent to reserve or take more than seven per cent. In this instance the lender reserved twelve per cent. for the use of his money, and he intended to obtain it. The statute declares that to be usury, however ignorant he may have been of its provisions, or deceived by the use of the word *exchange*.

There is no escape from the conclusion that the notes given in June, 1840, were usurious and void. The securities now in existence are mere renewals of the original notes, and equally void, and the transfer of Tyler & Jacks note, is also invalid; unless the latter, together with the renewals in June, 1842, are new contracts, made in another state, the laws of which are not proved.

The notes of that date were made in this city, and sent from here to the defendant at Bridgeport, in Connecticut. The renewal had been negotiated previously, but it does not appear at what place this occurred. The answer states that the defendant was then staying at Bridgeport, and it is particular to state that the new notes were received, and the notes of 1841, delivered up, at that place; but it does not allege that the negotiation for the renewal was at Bridgeport. If the defendant relied upon a change

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in the *lex loci*, to affect the continuity of this usury, he should have made the point clear beyond a doubt. As it stands, the original transaction was here, the renewal in 1841, was here ; the notes in 1842, were made and executed here ; and they were payable here, because it was necessary to demand them of the makers, in order to charge the indorsers. I do not think that their delivery to the defendant in another state, where he was abiding temporarily, affects the law of the contract. But if the negotiation had been made, and the new notes signed and delivered in Bridgeport, it would not in my view have altered the case in the least. It was simply a continuation of the original loan, for a longer period. Whether new securities were taken, or a covenant executed to give forbearance on the old securities, the substance of the thing is the same. There was no new loan ; no new consideration, save the forbearance, and for that interest was to be paid. When these new notes are brought before the courts of this state, and it is made to appear that they were renewals of securities, executed in New York, and void for usury, or were given in consideration of such securities ; I apprehend that we have no alternative but to hold them void on account of the original taint ; whether the new notes were executed here, or in one of the neighboring states.

The complainants are entitled to the relief prayed for in their bill.

Decree accordingly.

J. G. SMEDBERG, Administrator, &c., v. WHITTLESEY and
VAN NOSTRAND.

WHERE a party to an usurious bill or note, gives a new security for it to a holder for value, without notice of the usury, the new security is valid, although the holder could not have recovered on the bill or note.

The possession of a bill or note by an indorser, is presumptive evidence that it was transferred to him on a good consideration before its maturity.

The giving of a new note without objection, by the debtor on an usurious note held

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by an indorsee, is of itself an admission that the indorsee is a *bona fide* holder of the old note, without notice of the usury.

In a suit upon a new note so given, the holder may rely upon such admission, in connection with his possession of the old note, to overcome the defence of usury in the latter. And the burthen of proof will be cast upon the defendant, to prove that the holder had notice of the usury, or received the usurious note without a sufficient consideration.

Where a bill states the indorsing of a note by the defendants, payable at a particular place, and the answer admits the indorsement of the note, without any qualification, the defendant cannot prove that the place of payment was inserted after he indorsed it.

The bill stated, that a note was not paid when due, but was duly protested, and notice duly and legally given to the indorser, and as evidence thereof, referred to a notary's certificate annexed. It appeared in proof, that the demand and notice were made and given by another person.—*Held*, that the proof was competent, and the reference to the certificate might be rejected as surplusage.

In a suit to compel A. to transfer stock, on a contract to transfer it if B.'s note were not paid at maturity, B. is a proper party with A.

December 9, 12, 1845 ; February 24, 1846.

THE bill was filed, May 27th, 1844, by Charles G. Smedberg against Friend Whittlesey and James Van Nostrand. The defendants answered, and proofs were taken, after which Mr. Smedberg died. The complainant was appointed his administrator, and revived the suit on the 27th of October, 1845.

The case made by the bill was as follows. C. G. Smedberg in January, 1844, was the holder of two notes of two thousand dollars each, made by one Wilcox and indorsed by Whittlesey, who resided in Connecticut, on which he had taken out an attachment against Whittlesey's property, under the statute relative to proceedings against non-resident debtors, and levied on the stock hereafter mentioned.

In order to procure the discharge of the attachment, two new notes were given on the 30th of January, 1844 ; one for \$1297 45, which was not in question in this suit ; and the other for \$3000, made by Edwin Wilcox, indorsed by Whittlesey, and payable in May following. To secure the latter note, Whittlesey procured Van Nostrand to give a certificate that he held thirty shares of the stock of the American Exchange Bank, which he thereby agreed to transfer to C. G. Smedberg, on Whittlesey's becoming legally liable to pay that note. The note fell due on the 14th of

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May, 1844, was protested on that day for non-payment, and notice of its not being paid, regularly given to the indorser, Whittlesey. Smedberg presented evidence of these facts to Van Nostrand, and called on him to transfer the thirty shares of stock, pursuant to the agreement, which he refused to do. The bill prayed for a transfer of the stock, and for costs.

The answer alleged that the notes for \$2000 each, were usurious and void, of which Smedberg had notice, and that he was not a holder of those notes in good faith for value. The defendants insisted, that the note for \$3000 was therefore tainted with the original usury and void. The answer averred, also, that the note was not legally demanded of the maker when it was due, the demand not being made at his residence or place of business, and that therefore Whittlesey was not legally charged with the payment of the note. Whittlesey objected, that he was not a proper party to the suit.

Much testimony was taken on the subject of the consideration of the two notes of \$2000, and the alleged usury in those notes, which it is unnecessary to state, as the court did not dispose of that question. Such other testimony as is important to an understanding of the points decided, will be found in the opinion of the court.

J. N. Platt, for the complainant.

J. S. Bosworth, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The first ground of defence which I will notice, is that the notes which were given up by the intestate in January, 1844, were usurious, and the note of \$3000, for which the stock was a security, is therefore void; the complainant having omitted to prove that the intestate paid value for the former, and that he received them without notice of the usury.

It appears that the intestate was the holder of the notes said to be usurious, in December, 1843, at which time they were past due; and there is no proof how he came by them, or what he

paid for them. They were in his possession, indorsed by the defendant Whittlesey.

The possession by an indorsee of a negotiable promissory note, is presumptive evidence that it was transferred to him on a good consideration and before its maturity. (*Pratt v. Adams*, 7 Paige, 615, 629; *Morton v. Rogers*, 14 Wend. 590, per Chancellor.) The latter part of the proposition is familiar law. In *Nelson v. Corning*, (6 Hill, 336,) Judge Bronson says, where the action is brought by an indorsee, the maker cannot set up any equities between himself and the payee, until he has shown that the holder received it, either without consideration, or after it became due, or with notice of the facts set up as a defence. No such proof is given by the defendants in this case, and in intendment of law, the intestate was a *bona fide* holder of the notes without notice of the alleged usury.

On those notes he issued an attachment against Whittlesey, under the statute relative to Absent and Non-Resident Debtors, and seized the stock in question. The consideration for the note of \$3000, was the discharge of the attachment proceedings and the original notes. It was made without insisting upon the alleged usury, or indeed averring its existence.

Can Whittlesey now avail himself of that defence?

It is well settled that where the maker of an usurious note or bill, gives a new security for it, to one to whom it has been transferred for a valuable consideration without notice of the usury, the new security is valid, although the indorsee could not have recovered on the note or bill. (*Ellis v. Warnes*, Moor 752, s. c. Cro. Jac. 33; *Cuthbart v. Haley*, 8 T. R. 390; *Kent v. Walton*, 7 Wend. 256.)

It is urged, however, that in order to sustain the new security, the holder must prove that he paid a valuable consideration for the usurious note or bill, and that he is not permitted to rely upon the legal presumption arising from his possession of such note or bill.

The authorities relied upon, were either cases in which the holder of an usurious note or bill, sought to recover notwithstanding the usury, under the exception in the former statute of usury; or those in which it was shown that the true owner of the

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note or bill, had been deprived of it by fraud, larceny, or the like. In the former class, the defendant by proving the usury, had brought himself within the provisions of the statute, and shown the security to be void, and the plaintiff was thereupon put to bring himself within the exception. But he was not required to go a step beyond the language of the exception, because after proving payment of value, he might avail himself of the legal presumption that the note was transferred to him before it became due. In the other class of cases, a better title being shown in the original holder, the plaintiff rests solely upon the exception made by the law, in favor of commercial paper, and must prove the existence of the exception. In several of the cases, where the new security has been enforced in favor of an indorsee, who received it on relinquishing the usurious note, it appeared that he had taken the latter upon a valuable consideration paid. But I find no decision which requires such proof to be made. On the contrary, in the first reported case where the new security in the hands of a third person was upheld, *Ellis v. Warnes*, there was nothing shown beyond the existence of a debt in favor of the plaintiff, against the usurer, and it did not appear that any obligation was given up or debt cancelled, on receiving the usurious security. In *Cuthbart v. Haley*, the plaintiffs on receiving the usurious notes from the payee, for whom they were bankers, credited the amount to him in account. It did not appear that he had drawn out any part of it, but the stress was laid upon the fact that the plaintiffs received them without fraud, and without notice of the usury. And see *Powell v. Waters*, (8 Cowen, 696, per Colden Senator.)

I have stated the presumption which the law derives, from the possession of a bill or note, that the holder received it in good faith, and before it became due. I think that when a debtor on an usurious note, which has been transferred to a stranger, gives a new note to such stranger, without raising any objection to the validity of the former, it is of itself an admission that he is a *bona fide* holder of the same, without notice of the usury. And in my opinion a plaintiff may rely upon the legal presumption, arising from the possession of the usurious note, and upon such admission derived from the giving of a new security, to recover upon

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the latter, notwithstanding the usury in the former. And if there be any circumstance of notice, or of the want of a good consideration, in respect of such first note, it is incumbent on the party relying upon the defence of usury in such a case, to establish it by proof.

In this suit there is the further consideration of withdrawing the attachment, which of itself forms an important point for sustaining the new note. (*Stewart v. Eden*, 2 Caines R. 150.)

On both grounds combined, I am clear that the defence of usury cannot be set up to the note of \$3000, and it is unnecessary for me to look into the testimony bearing upon that point.

The next question is upon the alteration of the note, after Whittlesey indorsed it, so as to make it payable at the Fulton Bank.

It is sufficient to say of this, that it is not set up in the answers. Moreover the bill states expressly, that the note was payable at the Fulton Bank, and a copy of it is attached to the bill, by which it appears to be payable there. Whittlesey admits in his answer, that he indorsed the note, and his silence as to its terms, is an admission that it was payable as stated in the bill.

Next it is objected that the protest of the note, and notice of its non-payment, are not proved as they are alleged in the bill.

The complainants statement is, that the note fell due on the 14th day of May, 1844, when it was not paid, and it was duly and legally protested for non-payment, and notice of such non-payment duly and legally given to Whittlesey, the indorser. The bill then refers as evidence of this, to the notarial certificate of Mr. Franklin, which is set forth at large, and which states the presentment of the note at the Fulton Bank on the 14th of May, that payment was refused, the note was thereupon protested, and on the 15th of May, notice of its protest was mailed to Whittlesey, directed to his place of residence.

It turns out in proof, that Mr. Franklin had nothing to do with the demand, protest or notice, and knew nothing of either; but the same were performed by Foley, a clerk of a former notary, who used Mr. Franklin's name and seal furnished to him in blank. Foley proves a regular demand of the note, its non-payment, and the mailing of the notice to Whittlesey. The point turns on

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the reference in the bill to Franklin's certificate, and it is said the complainant can prove no demand, protest or notice, except those stated in the certificate.

It is evident that the defendants have stumbled upon this variance, if any it be, because there is no issue upon it in the answer ; and a distinct ground is there set up, viz. that the note ought to have been demanded at the maker's residence or place of business, and therefore the defendant denies, that it was legally protested, and notice duly and legally given so as to charge him. The only effect of the variance, under such circumstances, would be to have the cause stand over for an amendment of the bill.

I do not however, deem it a material variance. The substantial allegation is, that the note was presented for payment at the proper time and place, and notice of its non-payment given in proper form, and season to Whittlesey. It was quite immaterial, whether this were done by Franklin or by Foley. If the whole allegation, commencing with the reference to the notarial certificate, were stricken out, the charge in the bill would still be sufficient, and the proof would sustain the charge. That allegation may therefore be rejected as surplusage, especially as no issue is made upon it, and it has in no respect misled the defendants.

The complainant has proved, that Whittlesey became legally liable to pay the note of \$3000, and he is entitled to have the stock transferred to him by Mr. Van Nostrand, with costs of the suit.

Whittlesey was a proper party to the suit, and his objection on that score is not well founded.

Decree accordingly.

L. FREEMAN v. DEMING and others.

J. C. FREEMAN v. DEMING and others.

IN a suit for an account of a joint adventure, the offers to account made by a defendant before the suit, do not prevent the usual decretal order that the accounts be taken.

The giving of negotiable promissory notes for the price, is not of itself such a payment, as will constitute one a *bona fide* purchaser in equity.

But if such notes have been negotiated, and when due are apparently, and so far as the makers have reason to believe, really, in the hands of a holder in good faith, for value, in the usual course of trade; the makers are warranted in paying the same, although they then have been informed of the equity of the party claiming the thing sold to them; and they may rely upon the giving of the notes and such payment, as constituting them *bona fide* purchasers.

An assignment for the benefit of creditors, giving preferences, made in June, 1842, by one hopelessly insolvent, against whom there were judgments and executions, and who in five months, became an applicant for the benefit of the Bankrupt Act of 1841; *held*, to have been made in contemplation of bankruptcy, within the meaning of that act, and therefore void.

Where, on a bill filed by the assignee under such a void assignment, the general assignee in bankruptcy being a defendant, claimed and was held entitled to the fund, and the other defendants had not raised any objection to the voluntary assignee's title; the suit was allowed to proceed for the benefit of the assignee in bankruptcy; he being put to his election to adopt the suit, or abandon his claim.

December 8, 9, 1845; March 10, 1846.

THE original bill was filed, December 18th, 1841, by Lorrain Freeman, against Martin Deming, Horace Meech, W. Mayo, and Alfred Van Santvoord. The complainant assigned the subject matter of the suit to James C. Freeman, on the 28th of June, 1842, and soon after was declared a bankrupt under the act of Congress; whereupon in June, 1844, J. C. Freeman filed a supplemental bill to continue the suit, in which Isaac Newton, and W. C. H. Waddell, the general assignee in bankruptcy, were added as defendants. All the defendants except Mayo answered, and the suits were heard on pleadings and proofs. So far as the facts are material in respect of the points now reported, they were as follows:

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In February, 1841, Deming purchased of W. Whilden, the steamboat *Telegraph* for \$27,000, of which \$10,000 was paid, and for the security of the residue W. retained the title to two-thirds of the vessel. The purchase was one-half for Meech, one fourth for Deming, one-eighth for W. Mayo, and one-eighth for Miller & Davenport. The latter in June, 1841, sold and assigned their interest to L. Freeman. The boat was run by Deming, as master, for account of the owners, and stores, &c. were furnished by Miller & Davenport, and by L. Freeman.

On the 25th of October, 1841, Deming assuming to be the owner of all but Whilden's interest, joined W.'s agent in a sale of the steamboat to A. Van Santvoord, (with whom Newton was interested,) for \$25,000; who after deducting the sum due to Whilden, gave his notes, indorsed by Newton, for the balance \$8000, to Deming. Of these notes, \$4000 were delivered by Deming to various persons, to whom he alleged the steamboat was indebted; one note of \$1500 at twelve months, was transferred to Meech, and the residue, viz.: one of \$1500, at fifteen months, and two of \$500 each, one at twelve and the other at fifteen months, were in Deming's possession when he answered the original bill.

L. Freeman claimed that he was entitled to one-eighth of the \$8000 received on this sale, and to an account from Deming and Meech, of the earnings of the boat while owned by the parties. He alleged that the sale was made without his assent or sanction, and claimed a lien on the vessel for the amount due to him.

It appeared that Deming was insolvent, and on filing the bill, L. Freeman obtained an injunction, restraining him from transferring or disposing of one-eighth of the notes received on the sale.

Van Santvoord and Newton were ignorant of any right or claim, other than Deming's and Whilden's, when they bought the steamboat and gave their notes. Newton paid the notes at maturity. He knew L. Freeman's suit was pending, but not its nature or objects. He paid the three notes above stated as in Deming's hands, at the American Exchange Bank, where they had been lodged for collection by the Albany Exchange Bank as owners, and he averred they were owners of the notes.

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In fact, the note of \$1500 received by Meech, was discounted by the Chemical Bank before its maturity, and was collected by that bank. The \$1500 note, and one of those for \$500, retained by Deming, were discounted before they were due, by *bona fide* purchasers, and were collected in their behalf. The other note of \$500, at twelve months, was indorsed by Deming to a mercantile house in Albany, who indorsed it, and left it with the Albany Exchange Bank for collection, and by that bank it was indorsed and sent to the American Exchange Bank, where it was paid by Newton when it fell due. Deming attempted to prove that before the suit was commenced, he offered to come to a full accounting with L. Freeman and his solicitor.

The general assignee in bankruptcy, in his answer to the supplemental bill, alleged that the assignment of L. Freeman to James C. Freeman, was made in contemplation of bankruptcy, was a fraud upon the bankrupt act, and void; and insisted that he as general assignee, was entitled to the fund claimed by the original bill.

A. H. Dana, for the complainant.

A. P. Man, for Deming and Meech.

C. Van Santvoord, for Newton and Van Santvoord.

B. W. Bonney, for Waddell, the General Assignee.

THE ASSISTANT VICE-CHANCELLOR.—As against the defendants, Deming and Meech, the suit establishes a joint purchase of a steamboat, and the running the same on the joint account of those parties together with Lorrain Freeman as successor of Miller & Davenport, and with William Mayo. The parties have contributed unequally towards the joint charges, and Freeman has received no part of the proceeds of the sale of the vessel. His assignee, J. C. Freeman, is entitled to an account as a matter of course. Whether the attempts of Deming to render an account, as insisted by him, were such as to put Freeman in the

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wrong in filing his bill, cannot be determined until the state of the accounts is ascertained.

In the mean time, Deming, who does not deny his insolvency, should transfer and pay over to a receiver, all the proceeds of the boat which he had remaining in his hands when the bill was filed, with the exception of such as he has paid in good faith to creditors having demands against the boat.

The defendants Newton and Van Santvoord, bought the steamboat of Deming, without any notice of the complainant's rights, and paid the entire consideration in their negotiable promissory notes.

The original bill alleges, that the sale was made without L. Freeman's knowledge or consent; but the course of the complainant's proceeding has been to affirm the sale. He claims to have notified Newton and Van Santvoord of his rights, in time to prevent them from paying the entire amount of their notes, and in the original suit, Van Santvoord was enjoined from paying to Deming the complainant's eighth part of the notes. Newton was not affected by the injunction.

It is no doubt true, that the giving of the notes, would not be deemed a payment before notice of the equity of the complainant while Deming retained them; and if after such notice, Van Santvoord had paid them to Deming, he could not protect himself from responding to the complainant, on its appearing that he was entitled to receive a part of such notes. And the complainant insists, that as to the note of \$500, payable at twelve months, these defendants paid it in their own wrong, and are liable to account for it to him.

There are two answers to this claim. First, the complainant did not assert that he was entitled in any aspect of the case, to more than \$1000, or one-eighth of the purchase money received by Deming. And when these defendants paid the note in question, there was still outstanding \$2000 of the notes given on the purchase. It does not appear that they knew, or that they could have known, but that the complainant's one-eighth was in the sum last mentioned; nor but that he had intercepted or laid hold of those notes in order to protect his interests. The note of \$500 was not in Deming's hands, and there is no ground for saying

that Newton or Van Santvoord when they paid it, had any reason to suppose they were infringing upon the complainant's rights.

The other answer to the claim is, that these defendants had a right to suppose from the manner in which the note was presented to them, that it was in the hands of third persons in good faith, who could collect it of them if it were not paid. It came through a bank in Albany, to a bank here for collection, and was indorsed with the name of a mercantile house at Albany, as if it had passed through their hands in the usual course of trade. Under such circumstances, I do not think that they were bound to suffer the note to be protested and their credit thereby injured, because of their situation in reference to the complainant. They had bought the property of Deming, who had been entrusted with the title, and if he proved faithless to his principals, it was not the fault of the purchasers. On discovering the sale, the complainant ought to have resorted to efficient means to prevent Deming's parting with any of the notes; and could not expect to have the purchasers embroil themselves with the holders of their negotiable paper, to whom Deming had passed the same away. In this instance, L. & W. Merchant became the holders of the note of \$500, for a valuable consideration, soon after it was given. Whether the consideration was such as constituted them *bona fide* purchasers of the note, I need not determine; because I think that under the circumstances of this case, Van Santvoord and Newton were warranted in paying it to the persons holding it, on the assumption that they were such purchasers.

The fact that there were still \$2000, of the notes outstanding, was a sufficient reason to excuse V. S. and Newton, from calling on the complainant to look into the title of the holders of the note of \$500; if any excuse were necessary.

The bill must be dismissed as to Van Santvoord and Newton, and I do not see any ground on which the complainant can be exonerated from costs.

The remaining question to be disposed of at this time, grows out of the claim of the assignee in bankruptcy.

It appears that Lorrain Freeman, when he assigned this de-

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mand to James C. Freeman, on the 28th of June, 1842, was insolvent and unable to pay his debts; and judgments were then outstanding against him, on which executions had been issued. He became a voluntary applicant for the benefit of the bankrupt law, on the 23d of November following, and was declared a bankrupt in due course. The assignment itself recites his indebtedness to the creditors, set forth in a schedule annexed, and that by reason of his embarrassments in business, he is at present unable to pay the same; and that he is desirous to the best of his ability, to make some provision towards the eventual satisfaction of those debts, as far as lies in his power; it then transfers this and another claim, in trust to pay certain preferred debts, and to divide the residue among other creditors, all of whom are specified in the schedule.

These facts show that L. Freeman was conscious of being in a state of hopeless insolvency. The assignment was an act entirely out of the usual course of business, not made with any view or expectation of aiding him in continuing his business, but it was made for the avowed purpose of preferring some of his creditors, to the extent of his limited ability, while he had the power.

It was not intended or accepted as payment of the debts preferred, and no evidence of his having other means for the discharge of his liabilities has been introduced, to rebut the strong inference arising from the assignment itself.

It has been decided by Judge Story, and I think justly, that the words "in contemplation of bankruptcy," in the first clause of the second section of the late bankrupt act, mean in contemplation of a *state* of bankruptcy, or rather of actually stopping one's business, because of insolvency and incapacity to carry it on. (*Hutchins v. Taylor*, 5 Law Reporter, 289; *Arnold v. Maynard*, 2 Story's R. 349.) The same rule is recognized in *Jones v. Sleeper*, (2 N. Y. Legal Observer, 131) by Judge Ware, in the U. S. District Court in Maine.

It follows that the assignment of this demand to J. C. Freeman, must be deemed void, and a fraud on the bankrupt act, and the general assignee is entitled to claim and receive the same as

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a part of L. Freeman's assets, which passed to him by force of the order, declaring him to be a bankrupt.

This being the result, the other defendants insist that the bill must be dismissed, because J. C. Freeman's title fails. The defendants Newton and Van Sautvoord, have no occasion to urge this point in their behalf; and the other defendants have not set it up in their answers. The only party who has a right to allege the invalidity of the assignment, acquiesces in the complainant's prosecution of this suit, claiming to receive its fruits under the provision of the bankrupt act. I think he is at liberty to take this ground, and it does not affect the rights of Deming and Meech.

In regard to the complainant, it is proper that the general assignee should take his position at this time, and either adopt the suit as it stands and conduct it in future, or abandon his claim. The decree will be made to conform to his election. In other respects, it will be a decree against Deming for a receiver, and against Deming and Meech, for an account of their respective parts, in the affairs of the steamboat; and dismissing the bill as to Van Santvoord and Newton, with costs. All further questions and directions will be reserved.

COOKE v. SMITH and others.

A merchant who was sued for his debts and was insolvent, sold his entire stock in trade to his confidential clerk, on a credit of from three to eighteen months. It was a part of the arrangement that the clerk should continue the business with the merchant's sister, who was to be allowed to draw out of the concern, an annual sum, and was to pay the same to the merchant, for his assistance in the business. *Held*, that the sale was fraudulent and void as against creditors.^(a)

The vendor assigned the notes which he received on the fraudulent sale, to an assignee for the benefit of himself and other preferred creditors of the assignor.

Held, that the assignee was not such a *bona fide* purchaser as to be protected in the notes or their proceeds.

Held also, that the acceptance of such an assignment, was not an affirmation of the

(a) See *Vance v. Phillips*, 6 Hill, 433.

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fraudulent sale on the part of creditors, so as to prevent other creditors from impeaching it for fraud.

A creditor at the time of a fraudulent sale, who subsequently recovers a judgment, may on the return of his execution unsatisfied, file a bill to set aside the sale; and may follow the proceeds of the property sold, into the hands of any number of intermediate assignees, and it is not beyond his reach, until it lodges in the hands of a creditor in good faith, who has received and applied it upon his debt, or of a *bona fide* purchaser without notice of the fraud.

December 15, 17, 1845; March 13, 1846.

THE bill was filed August 16, 1844, by Zenas Cooke, against Silas C. Smith, John Gray, Jane Smith, John H. Browning and Jesse W. Benedict, on the following case. S. C. Smith, a merchant in New York, in the fall of 1843, became greatly embarrassed, and was sued by his creditors. His debts were about \$30,000, and his assets realized not beyond a third of that amount. On the first of January, 1844, he made a sale of all of his stock in trade to Gray, who for many years had been his confidential clerk, and who was worth about \$1000, although only \$200, or \$300, of it, was available. The amount of the sale was \$7000, for which Gray gave his notes payable monthly, and running from three to eighteen months, after date. Gray then continued the business with Jane Smith, a sister of S. C. Smith, in the name of Smith & Gray. This sale, the complainant insisted was fraudulent as to creditors. The facts in regard to it will be found more at large in the opinion of the court. Gray's notes were not actually given till February 7, 1844, and on the 9th day of February, S. C. Smith assigned the notes to Browning in trust, to collect the same and pay certain preferred creditors, of whom the assignee was one. On the 13th of March following, a creditor of S. C. Smith's having levied on the goods in the store, Gray, and Jane Smith executed an assignment to Benedict, for the benefit of their creditors, and among others, to pay the notes given by Gray to S. C. Smith. The goods assigned, were, in part those sold by S. C. Smith, and in part goods subsequently purchased by the assignors. Benedict proceeded to sell the goods, and in April, 1844, closed the whole by a sale at auction.

The complainant recovered a judgment against S. C. Smith, February 12, 1844, and issued his execution in March, which was returned unsatisfied in due course, and he then filed his bill

to set aside the sale &c., as fraudulent. It appeared that Jane Smith had \$300, which she gave to Gray, to put into the concern, and which by the books appeared to have been returned to her or S. C. Smith, before the assignment of Smith and Gray; as was the case with Gray's advances also.

¶ All the defendants answered the bill, and the cause was heard on the pleadings and proofs.

F. Sayre, for the complainant.

H. Brewster, for Gray and S. C. Smith.

J. Wyman Jones, for Jane Smith.

C. O'Connor, for Browning and Benedict,—after illustrating the point urged by all the defendants, that the sale by S. C. Smith to Gray, was not fraudulent as against creditors; and contending that the subsequent assignment, by S. C. Smith to Browning, and by J. Smith and Gray to Benedict, were free from all fraudulent design or purpose; argued two other propositions in behalf of the assignees.

1. If there was any defect in the title of Gray, acquired by his transactions with S. C. Smith, it was only defective as against creditors. The first creditor who acquired the power, obtained the right of exercising this election to affirm or disaffirm the sale; and Browning himself, and as representative of the other creditors of Smith, provided for in the assignment, had the power to elect, and did elect to affirm the sale and notes, before the plaintiff acquired any lien upon the goods assigned to Gray. (*Parmelee v. Egan*, 7 Paige, 611.)

2. The complainant having acquiesced in the transfer to Gray, and without a murmur suffered the latter to go on with the business, contract new debts, mingle with the Smith goods those acquired by such new debts, it would be unjust and inequitable to permit the complainant now to impeach the transaction. (*Poole v. Mitchell*, 1 Hill's S. C. Law. Rep. 404.)

THE ASSISTANT VICE-CHANCELLOR—This is a close case on the question of fraud in the sale from S. C. Smith to Gray, but

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after carefully considering the facts, I cannot resist the conclusion that the sale was made with the intent to hinder and delay the creditors of Smith, and that Gray was aware of the objects which Smith had in view.

Smith was deeply insolvent, and in consequence of the pending suits against him, it was impossible for him to continue business much longer in his own name. Gray was his confidential clerk, and knew his situation. Although Gray was a man of good character, his means were small, and totally insufficient to warrant the sale to him of so large a stock of goods upon credit. No merchant in regular business, would have sold such an amount to him without security, on the credit that was given by Smith.

It was unquestionably a part of the agreement between Smith and Gray, that Jane Smith should be introduced as a nominal partner with Gray, and that S. C. Smith should be employed by the new firm, and receive a compensation for his services. Gray's entries in the books, are conclusive that the arrangement that Jane should be his partner, was cotemporary with the sale to him; and the employment of S. C. Smith, must then have been understood between them. Gray's entry in the day book, shows that he was to share equally with her in the gain or loss, and each was to be at liberty to draw out \$600 a year. This was the precise sum which S. C. Smith, was to receive and he was to receive it from Jane's share, and in lieu of her drawing it out of the concern; and it is not probable that Gray would agree to give all his services, without some equivalent from her.

Smith says he was employed on one of the first days in January, as of the first of January, which was the day from which the sale and the partnership both dated.

Gray never had any conversation with his partner about the formation of the firm, or its conduct after it went into operation. S. C. Smith managed it all; and her situation, circumstances and pursuits, show that the use of her name was all that was wanted, and that her interest in the concern was nominal. The defendants say that her name was obtained to keep up the good will of the store, which was in some measure dependent upon

the name of Smith. This may have been the inducement held out to Gray, but it is plain that S. C. Smith used her name to secure a control in the concern, and a means of subsistence for himself.

I cannot doubt from the situation of Gray and Jane Smith, in respect of S. C. Smith, and their respective relations, that S. C. Smith arranged and managed the whole affair of the sale and the partnership in his own way, and to subserve his own purposes. His plan was, to place the goods on hand, in such a position, that they would form the basis and capital for continuing the business of the store without interruption; and enable him through the use of his sister's name, to enjoy half the gains and profits, and at all events to secure \$600 a year towards his support.

The notes were not given till five or six weeks after the sale, nor until they were wanted for Smith's assignment to Browning.

The effect of the transaction was necessarily to hinder and delay the creditors, because instead of a levy on the goods and a sale for cash, the creditors were turned over to a series of notes running from three to eighteen months, against a man of slender pecuniary responsibility. This being the effect, and such effect being intended by Smith, and its object being to derive a future benefit from the transaction to himself, it was in my judgment, fraudulent against his creditors.

This result invalidates Gray's title to the goods, and his voluntary assignee can have no better title than he had, either in the goods which remained on hand, or their proceeds.

I do not think the question is affected by the intermediate assignment of the notes by S. C. Smith to Browning. It is not necessary to dispute the proposition, that if Browning had received the notes in payment of his debt, without notice of the fraud, he would have been entitled to enforce them against Gray, and to claim the benefit of Gray's assignment of the goods to secure their payment. But that is not this case. Mr. Browning is an assignee, in trust for paying preferred creditors, himself among the number, *out of the proceeds of these notes*. If Gray had failed, and his notes become worthless, Browning's debt against Smith would remain in as full force as if the assignment

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to him had never been executed. There was neither purchase or payment in the transaction.

I do not think that the principle decided in *Parmelee v. Egan*, (7 Paige, 610,) is applicable. The facts in that case seem to be defectively stated by the reporter; but the point decided was, that a judgment creditor who had not issued an execution, was not in a condition to attack a fraudulent sale of goods liable to execution. Parmelee, who had issued an execution, while the goods were still in the hands of the fraudulent purchaser, was held entitled to be paid, in preference to the *bona fide* assignee for the benefit of other creditors. It was not decided in that case, that if the other judgment creditors had issued executions and had them returned unsatisfied before the filing of the bill, they would not have been entitled to the same preference as Parmelee received.

I think it should be so on principle; and that a creditor, who by his judgment in respect of real estate, his execution issued as to movables, and his execution returned as to things in action, is entitled to file a bill to set aside a fraudulent conveyance, sale or assignment; may follow the proceeds of the property transferred, into the hands of any number of intermediate assignees, and until the property or its proceeds, lodge in the hands of a *bona fide* creditor who has received and applied it upon his debt, or of a *bona fide* purchaser without notice of the fraud.

The complainant is not proved to have acquiesced in the sale to Gray, in any such manner as to preclude him from impeaching it on the ground of fraud.

As to the assignment to Mr. Benedict, the avoidance of the sale of the goods by S. C. Smith, does not render it fraudulent. Its effect is to withdraw from the assignee, so much of the assets as came from that sale, either directly or indirectly. He is entitled to be protected in the payments made by him before the bill was filed, and to receive his costs out of the fund.

As to Mr. Browning, if the unapplied fund in his hands, arose from the goods in question, it is liable to the complainant's demand, so far it is requisite to discharge the latter.

The complainant is entitled to a decree accordingly, for his debt, interest and costs.

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and others.

A corporation was created by a statute, with power to make life and fire insurances, grant annuities, and to make loans and invest its capital on bonds and mortgages; and the last section declared that the act should expire at the end of fifteen years, except as to insurances on lives, and the granting of annuities. By a subsequent statute, passed at the same session, the corporation was authorized to receive property of all kinds in trust, and to execute trusts in the same manner and to the same extent, as any trustees could lawfully do; and the corporation was directed to convert trust property and invest the same in stocks, or in bonds and mortgages. It also provided for a large increase of the capital stock of the company. A statute passed fourteen years afterwards, classified the directors, and limited the amount of its trusts, to five millions of dollars. Neither of the acts subsequent to the first, contained any limitation as to time.—*Held*, that the charter was perpetual. That the limitation to fifteen years, did not apply to the life insurance, annuity, or trust powers, conferred on the company. And that it had the power to loan money on bond and mortgage, after the fifteen years expired.

In respect of either of the three principal purposes for which the corporation existed, it was authorized to loan money on bond and mortgage.

It is not incumbent on a corporation enforcing a bond and mortgage, to show that it arose from some of its lawful pursuits.

The charter of a corporation prohibited its taking mortgages payable in a shorter time than one year, and the interest to be payable annually. On making a loan in July, the mortgage bore date eighteen days before the money was advanced, and by its terms was payable in one year from date, with interest to be paid yearly, on the first day of November in each year.—*Held*, that the mortgage was valid. The money could not be collected in less than a year from the date of the loan, that being the delivery and so the *date* of the mortgage.

Held also, that the statute regulating the time of payment, is to be deemed a part of the contract.

Held also, as to the interest, that the words "first day of November," should be rejected as surplusage, so as to give effect to the word "yearly," and thus render the mortgage operative.

Where a party setting up the defence of usury, alleged that certain bonds or evidences of debt, were advanced by the lender, and the proof showed that he advanced cash, the variance was held fatal.

December 18, 1845; March 14, 1846.

THIS was a bill to foreclose two mortgages executed by P. H. Perry and wife to the complainants, for securing \$9000; one

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on lands in Auburn, the other on lands in Aurelius, in the county of Cayuga. Both mortgages were dated June 26th, 1838; one was recorded the same day, and the other on the 19th of July, 1838. The answer of C. B. Perry, the owner of the equity of redemption, set forth among other things, that the bond and mortgages were delivered on the 14th of July, 1838, when the consideration, (which, it was alleged, consisted of certain bonds, or evidences of debt of the company,) was advanced; although the bond and mortgages drew interest from June 26th. That therefore more than seven per cent. interest was reserved and taken, and the mortgages were usurious. That, by the second section of the charter of the complainants, it is enacted as follows: "That the said corporation shall have authority to make loans on the security of bonds and mortgages, or conveyances of improved farms, houses, manufactories, or other buildings, or on any other real estate." And that by the third section of the same act, it is amongst other things, enacted, "That any such loans on bonds and mortgages, or other securities on real estate, shall not be made payable in a shorter time than one year, and the interest payable annually; and the said corporation shall not foreclose any such mortgages or securities, until after the expiration of five years after the date of such mortgage. *Provided*, the interest thereon is punctually paid." That by the terms of the mortgages in question, the principal is made payable in a shorter time than one year from the time the pretended loan thereon was made; and the interest was required to be paid on the first of November next ensuing its date, and if it remained unpaid for thirty days, the whole principal thereupon became due. That the bond and mortgages were therefore taken and received by the company, contrary to the provisions of their charter; the company had no power or authority to receive the same, and they are utterly void in their hands, and cannot be enforced.

That by the twentieth and last section of the act, entitled "An act to incorporate The Farmers Fire Insurance and Loan Company," passed February 28th, 1822, and which is the same act by which The Farmers Loan and Trust Company was incorporated, it is enacted as follows: "And be it further enacted, that this act shall expire at the end of fifteen years from the time

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of its passage, except as to insurances upon lives, and of the granting of annuities. *Provided*, that all contracts previously made, shall be binding and obligatory." The defendant insisted that the existence of the complainants' incorporation ceased, and its corporate powers became and were extinct, except for the purposes in the last above recited section stated, and the corporation had not on the day of the date of the bond and mortgages, or at any time afterwards, any power or authority whatever, to loan monies or evidences of debt, or to purchase bonds and mortgages, or engage in any business whatever, except as authorized by the last above recited section, either by its original charter, or by any act amending the same, or by any law of this state. For this reason also, the defendant insisted the bond and mortgages were absolutely null and void, in the hands of the complainants.

The answer set forth a prior mortgage on the lands in Aurelius, which had been assigned to, and was held by the defendant.

The defendants, P. H. Perry and wife, put in an answer and disclaimer. The cause was heard on the pleadings and proofs.

The facts stated in C. B. Perry's answer, were admitted or proved, except as to the consideration of the mortgages, as to which it was proved to have been paid in the check of the company, on the 14th of July, 1838.

E. H. Ely, for the complainants, made the following points:

I. The defendants are estopped from denying the powers of the complainants to make loans upon bond and mortgage, they having been parties to the contract. (*Welland Canal Co. v. Hathaway*, 8 Wend. 483.)

II. The charter of the Farmers Loan and Trust Company, by the original act of incorporation, and the acts amending the same, for all purposes of receiving, taking and executing any and all trusts, in the same manner, and to the same extent, as any trustee or trustees might or could lawfully do, and as to insurances upon lives, and of the granting of annuities, is unlimited and perpetual. (Act of incorporation, Laws of 1822, p. 47, ch. 50. Acts relating to, or amending the same, Laws of 1822, p. 254, ch. 240; Laws of 1836, p. 281, ch. 210.)

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III. The power of this corporation, in regard to the investment of its funds as trustees, is unlimited ; only with this restriction, that the mode must be adopted in good faith, for the sole purpose of investments, and not with the view of carrying on any banking operation, or any traffic in stocks or goods, wares, and merchandise.

As trustees, they were bound to put out their money on mortgage. (1 J. C. R. 527, 620 ; 4 *ibid.* 619.)

IV. The power of this corporation, in regard to the investment of its capital, is general, except so far as it is in terms restricted by the original act of incorporation.

V. The bonds and mortgages are not, nor are any or either of them, void for usury, or for any other cause.

David Wright, for the defendant, C. B. Perry.

First. The bond and mortgage were executed, delivered and received, upon a usurious contract, and are therefore utterly void. Because, the loan was made July 14, 1838, and interest reserved from June 26, 1838.

Second. The principal secured to be paid by the bond and mortgage, is payable in less than one year from the time the loan was made, which is contrary to the express provisions of their charter. (Laws of 1822, p. 47, §§ 2 and 3 ; *The North River Insurance Co. v. Lawrence*, 3 Wend. 482 ; *The Life and Fire Insurance Co. v. The Mechanics Fire Insurance Co. of N. Y.*, 7 *id.* 31 ; *Edwards v. Farmers Fire Insurance and Loan Co.*, 21 Wend. 492 ; *Safford v. Wyckoff*, 4 Hill, 447-8—per Chancellor ; *Head & Amory v. The Providence Insurance Co.*, 2 Cranch, 168 ; *N. Y. Fire Insurance Co. v. Ely*, 5 Conn. Rep. 560 ; *Fox v. Horah*, 1 Iredell's Eq. Rep. 358.)

Third. The interest upon this bond and mortgage is payable before the end of the year after the date thereof, and also before the end of the year after the time of the loan.

The bond and mortgage bear date June 26, 1838, the loan was in fact made July 14, 1838. Interest is made payable Nov. 1, 1838, less than four months from date of the loan, and less than five months from the date of the bond and mortgage, and annually thereafter. (Same authorities as to last point.)

Fourth. The bond and mortgage were received, and the loan was made, more than fifteen years after the passage of the act chartering this company, to which it was limited.

The act was passed February 28, 1822, and the loan made July 14, 1838; more than sixteen years.

Fifth. If complainants' mortgage is good, it must be taken subject to the lien of the mortgage executed by Cook & Maxwell to Vowells, which is elder in date and lien.

We do not deny that the company was perpetual, but we deny that it had power to loan on bond and mortgage in 1838. The only powers left of those in the original charter, were to insure lives and grant annuities. There was no necessity for any power to loan on mortgage after the fifteen years. All its monies might be expended in annuities. Inconvenience furnishes no argument for the exercise of the power. The question is, was the power conferred? There has been no act since its charter which renews or enlarges the powers that by the last section were to cease in fifteen years. The act of April 17th, 1822, does not affect this part of the case, and that of 1836 merely changes the corporate name and classifies the directors. It does not extend the power to loan on mortgage beyond what the original act gave, and it expressly provides against any extension of the company's power by implication. Directors were as necessary for the business of life insurance and annuities, as for loans on mortgage.

If the authority to make such loans, was not confined to fifteen years, what power in its charter was limited? If the complainants are right in this, none of their powers have expired, not even that of fire insurance.

This corporation has not all the powers of ordinary trustees. It has none except such as are expressly given by its charter. We deny that this loan was made by them as trustees, out of trust funds. If the fact were so, the complainants must prove it; but they have not alleged it in the bill. The provision in the act of 1836, as to counsel fees on examining titles &c., cannot be construed to confer this power; for the company then had ten months left of the fifteen years in which they could make such loans, and the provision had its full operation during that time. (See *Fox v. Horah*, before cited.)

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Fifth. If the complainants mortgage is good, it must be taken subject to the lien of the mortgage, held by the defendant C. B. Perry, which is elder in date and prior in lien.

In behalf of the defendants, P. H. Perry and wife, the counsel insisted,

First. The complainants should not have made them parties, they having parted with their interest long before the commencement of this suit ; and

Second. Having been made parties, and having disclaimed, they are entitled to their costs.

W. Curtis Noyes, in reply. *First.* The estoppel for which we contend, is not that we are not to prove the complainants a corporation, or that making a contract with them, is evidence of their corporate existence ; but that when the corporate existence is shown, it is evidence of their right to make such a contract, and so far is an estoppel on the contracting party. It admits the legal capacity of the corporation to that extent. Otherwise great frauds might be committed against corporations. The company is bound by the same admission, the estoppel being mutual and reciprocal. (14 Johns. 238, *Dutchess Manuf. Co. v. Davis* ; *Bank of Michigan v. Williams*, 5 Wend. 478 ; *Welland Canal Co. v. Hathaway*, 8 ibid. 480 ; 2 Cowen, 664, 678 ; *State of Indiana v. Woram*, 6 Hill, 33 ; *Commercial Bank of Manchester v. Nowlan*, 7 Howard's R., Miss. 508.)

Where the objection is a mere want of authority, as in this case the alleged want of power to take a mortgage, both parties to the contract are precluded from insisting on the objection.

It is otherwise where the act is contrary to law, or is prohibited.

The complainants had the power to loan on bond and mortgage in 1838. Its name, a *Loan Company* shows that. As a corporation, fully created by the first section of the charter, it has the power to take mortgages. It is given expressly by the second and fourth sections. And the right to make loans, is incidental to the three principal powers conferred on the corporation. A company having power to grant annuities and insure lives, ne-

cessarily must loan its fund, and keep it invested at interest. This is the basis of its legitimate operations.

The power conferred by the act of April 17, 1822, to receive money as trustees, and to invest in stocks, or bonds and mortgages, gives ample authority.

The limit to fifteen years in the previous act, has no effect upon this subsequent law.

Then the act of 1836, striking out fire insurance from its corporate name, continuing it as a loan company, limiting its trusts to five millions of dollars; fully illustrates the powers for which we contend, in respect of loans and investments. The then Attorney General, Mr. Beardsley, reported to the Legislature in 1836, that the charter of the complainants was perpetual.

Vice-Chancellor McCoun decided in a case between T. Clowes and the complainants, that they had in 1838, the power to loan on bond and mortgage. And the same was held by Vice-Chancellor Whittlesey, in the eighth circuit, in the case of Carroll against the present complainants.

Second. As to the alleged usury. It is not set up in the answer as it is now relied upon. (8 Paige, 452.) But there was no usury at all. The securities were prepared in anticipation of the loan, and necessarily bore date before it could be completed. They took effect on the 14th of July, 1838, when the loan was actually made. (See 8 Wend. 533.) The interest then commenced.

Third. As to the bond and mortgages being payable in less than a year, and the interest also, the answer states that the loan was payable in a year, with interest yearly. That is the true construction. (7 Howard, 508; 8 Wend. 533.) Rejecting the words "first of November," which are repugnant to the words "payable yearly," and the statute is complied with.

The court should regard the statute as part of the contract, and controlling any thing contrary to the charter. (*Farmers Loan Co. v. Edwards*, 26 Wend. 541.) And in this respect the charter was directory; no penalty is added to the prohibition.

C. B. Perry signed our bond, and is bound to pay any deficiency. He cannot therefore set up a prior mortgage to defeat our debt. The court may impound the money payable to

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him on that mortgage, to answer the debt he owes the complainants.

THE ASSISTANT VICE-CHANCELLOR.—The objection to the securities in question, on the ground of usury, as it was taken at the hearing, is not sufficiently alleged in the answer. It is there stated, that certain bonds or evidences of debt, were issued by the complainants, as the consideration of the mortgages, and that the same were not issued or delivered to P. H. Perry, until the 14th day of July, 1838, whereas the bond and mortgages reserved interest from June 26, 1838, and the interest commenced accruing thereon at that date; wherefore, the answer insists, that the bond and mortgages were and are void for usury.

The evidence does not sustain this allegation at all. It is however, proved that the loan was paid to P. H. Perry, in the complainants check dated July 14, 1838, and delivered to him on that day; and it is claimed that this renders the securities usurious.

Whether it does or not, is not for me to determine on these pleadings. The testimony does not apply to the issue. (*Vroom v. Ditmars*, 4 Paige, 526; *New Orleans Gas Light and Banking Company v. Dudley*, 8 *ibid.* 452.)

The remaining objections are founded upon the charter of the complainants, and the acts amending the same.

And first, it is insisted that when these mortgages were executed, the complainants had no power whatever to loan on bond and mortgage, and that such power ceased at the end of fifteen years from the passage of the act of incorporation.

It is not necessary for me to recapitulate the provisions of the charter and the subsequent acts. I find that this subject was considered by the Vice-Chancellor of the eighth circuit in *Carroll v. The Farmers Loan and Trust Company*, on a motion to dissolve the injunction, decided August 17, 1844. In his opinion delivered on that occasion, he held that the corporation created by the act of February 28, 1822, incorporating the company, is perpetual. That although by the last section, the act itself was to expire at the end of fifteen years after its passage, yet the power of insuring lives and granting annuities was excepted, and

was coeval with the duration of the corporation. And that the act of April 17, 1822, enabling the company to receive property in trust, and to execute trusts, conferred new powers upon the company, which were not limited to any period of time, and continued after the termination of the fifteen years mentioned in the original act.

I fully concur in these conclusions, and I need not go over the ground which has been so ably occupied by the Vice-Chancellor of the eighth.

Therefore when the mortgages in question were executed, the Farmers Loan and Trust Company, were authorized by law to effect insurances upon a life or lives, to grant annuities on lives or dependent on any life, and to perform and execute trusts, in the same manner, and to the same extent, as any trustee might lawfully do.

For either of these purposes, I think they were authorized to loan money on bond and mortgage.

I have heretofore held that a corporation created for a limited and specific purpose, as this company was, has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such purpose, unless expressly prohibited by law, or the provisions of its charter. (*Barry v. Merchants Exchange Company*, 1 Sandford's C. R. 280.) In order to insure lives, or grant annuities, with safety to the parties interested, it is indispensable for a company to have a sufficient fund to meet the accruing losses which are inevitable in the one case, and to pay the annual sums stipulated in the other. The principal part of such fund must necessarily be invested, not merely for the advantage of the company itself, and its enhanced ability to meet its engagements, by reason of the increase from the interest or dividends; but also for the security of the persons holding its engagements. There is no better or more unexceptionable investment, than that made upon bond and mortgage. There is no statute forbidding this company thus to invest its legitimate means, and it may be added that unless the company can put out its annuity and life insurance fund in this mode, it cannot invest the fund at all. The same objection may be made to loaning it on stocks, or personal

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security, or investing it in any other mode, as is urged against loaning it on mortgage.

Under the power of the company to execute trusts, there is no doubt of its power to loan on mortgage. Indeed with the exception of government stocks, (by which I mean stocks of this state or the United States,) there is no other security upon which a trustee can make loans in the proper discharge of his duty, according to the principles of equity as established for more than a century before this corporation was created.

The investment of trust funds on bond and mortgage, is distinctly recognized in the act of April 17, 1822, and is alluded to in the act of April 30, 1836. Probably no express provision was made in regard to it, because the settled law required the company as trustees, to invest in stocks or on real estate security.

By the act last cited, the company was limited in the amount of its trusts, to five millions of dollars; which shows that the legislature expected it to deal very largely in this capacity as trustee; and the omission to point out any special class of investments, is conclusive that it was intended to place the company on the same footing in this respect, as individual trustees, having the same capacity and the same liabilities.

It was said at the hearing, that it was incumbent on the complainants, to prove that this loan was made out of trust funds, to sustain the mortgages, even if they were empowered to loan in this mode. I think this would be placing the burthen of proof where it does not belong. The corporation having invested this money, it is to be presumed that it arose from some one of its lawful pursuits, until the contrary is shown.

Second. The defendants insist that the mortgages are illegal, because they made the principal sum payable in less than a year after the loan was made, and required the interest to be paid in less than four months.

1. In regard to the principal sum. There is no pretence that the securities were intentionally ante-dated. They were undoubtedly prepared on the day they bear date, and were delivered as soon as the mortgagor could perfect them. By their terms, the principal is payable in one year from the date thereof, and

construing the statute by its very letter, they are not "made payable in a shorter time than one year."

But I agree that the restriction in the statute, was intended for something more substantial than this construction would yield. It means that the loans on real estate shall not be called for, until the end of a year after they are made.

In giving it this effect, I think it follows that the statute does not restrict either one party or the other, from showing that the date inserted in the security, is not the real time of the transaction. The defendant proves that these securities, bearing date June 26, 1838, were delivered, and the loan was made, on the 14th day of July in the same year. Having shown that to be the true date, can he insist in the face of the statute, that it became payable before July 14, 1839? If he proves that "the date thereof," referred to in the bond, was really and truly a different day from that expressed in it, does he not thereby extend the year limited for payment, to the true date as thus established?

Suppose in this case, there were no statutory restriction as to foreclosing at the end of the year, and on the 27th of June, 1839, a bill had been filed to foreclose these mortgages; and the defendants had set up in a plea that this loan was made on the 14th of July, 1838? Would it not have established that the debt was not due? I think it would, and that the statute regulating the time of payment is to be deemed a part of the contract, as if it were expressed in the bond and mortgages. Judge Cowen said this, of another provision in the same charter. (*Edwards v. Farmers Loan Co.*, 21 Wend. 483.)

In the mode in which loans on real estate are usually made, the mortgage is almost invariably dated and signed one or more days before the loan is completed. If the defendants are right in this point, the complainants must make all their mortgages payable thus, "in one year from the time of effecting this loan." The result of which will be, that without proof, the mortgage will be deemed payable in one year from its date; and with proof of the actual date of the loan, it will be precisely, as it is in the case before me, by the connection of the statute with the condition, due in one year from the date thus proved.

The Farmers Loan and Trust Company v. Perry.

Without determining what would be the consequence of the point, if it were held that these securities were made payable in contravention of the third section of the charter; I think that in respect of that provision, the words "*date hereof*" in the condition, ought to be construed to mean, what *date* properly imports, the delivery of the securities. There is much good sense in the observation of Sutherland, Justice, in *Tompkins v. Corwin*, (9 Cowen, 255,) that "where the justice and merits of the case are affected by the particular time when the bond or deed becomes a valid and subsisting instrument, there the time of the delivery becomes material, and may be set forth or proved by either party."

2. The interest is made payable yearly, as the same should accrue on the first day of November, in each and every year. This it is said, makes the interest payable November 1, 1838, and thus is contrary to the third section of the charter, which requires the loans to be made payable in not less than a year, "and the interest payable annually." To make the interest fall due on the first of November, 1838, the word "yearly," must be rejected as surplusage, because if payable *yearly*, no part of it could become due in four or five months. And we have as much right to reject the words "first day of November," as to reject the other limitation fixing the payment of interest. As the condition stands, it is capable of a construction which gives effect to all its words, and by which the first payment of interest would fall due on the first of November, 1839, and yearly thereafter. On the familiar principle, that where an instrument will bear two constructions, one of which will render it operative and the other void, the former should be adopted, I am bound to give to the mortgages the construction which I have just stated, rather than to enforce one which may render it illegal. On neither ground urged against the mortgages, on account of their terms of payment, is the defence established.

The mortgage to Vowles, assigned to C. B. Perry, appears to be prior to the complainant's mortgage on the lands in Aurelius, and the decree will declare its priority, if he desire to keep it on foot.

I find no evidence that Philo H. Perry and wife, were served

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with the notice prescribed in the 133d rule of the court, and they are therefore entitled to their costs.

- With these provisions, the complainants may take the usual decree for a reference and sale.

CLARKE and others v. SAWYER and others.

In an inquiry as to the mental capacity of a testator, his case is not to be treated as one of general derangement of mind, because for four or five months he was laboring under and recovering from a severe attack of apoplexy, and was suffering its necessary and usual concomitants, a deprivation of reason in the outset, and its gradual restoration.

On the contrary, the recovery from the effects of such an attack, so far as to survive four years without an intervening attack, shows presumptively that the patient must have overcome its most violent and peculiar features.

The delirium or imbecility of mind, or the unconsciousness, which ensues from violent or acute diseases, is not to be regarded as establishing a general derangement of intellect, so as to throw the burthen of proving a sound mind, upon the party setting up a deed or will, executed long after the force of the disease is spent, or it has terminated in one of a different character.

On a question of testamentary capacity, the opinions of physicians are proper evidence; but the opinions of other persons, are to be weighed by the facts upon which they are based, and such facts are more important than the opinions.

Proof of *instructions*, is never called for, when the will propounded is *officious*, i. e. bestows the property upon those who have natural or direct claims upon the bounty of the testator.

It is only where the person who draws or procures the will, takes a benefit under it, and there are circumstances of suspicion, greater or less, arising from the capacity of the decedent, the extent of the gift to such person, the claims of others upon the decedent, the amount of his property, or the like; that proof of instructions is required.

A will is not to be set aside on as slight evidence of mental unsoundness, as would overturn a contract or conveyance executed on a consideration very questionable, or on terms grossly unequal, or a gift *inter vivos*, to one who had no reason to expect it from the donor.

Valid wills are made daily, by persons in the last stages of disease, when the bodily functions are totally prostrated, and the mental powers much impaired. These circumstances are not considered as entitled to weight, unless the testator's bequests are extravagant, or widely different from those which his situation and that of his family, would lead a sensible man to expect.

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The influence of affection or attachment, is not such an influence as will vitiate a will; or the mere desire of gratifying the wishes of one who is entitled to consideration and remembrance in the disposition of the decedent's effects.

The presumption of undue influence, exercised by a husband over a feeble and dying wife, is far stronger than any that can be indulged when a similar charge is made against a wife in respect of her deceased husband.

In a suit to set aside a devise, on the ground of the mental incapacity of the decedent, and of undue influence exercised by his second wife; it appeared that the decedent, a very active, intelligent, business man, when in his sixty-seventh year, had a severe attack of apoplexy, which entirely prostrated him in mind and body for two or three months; after which he slowly recovered, so far as to transact his business and sign his name, for two or three years. He continued partially paralyzed in his limbs, so as to be confined to his room, and most of the time bed-ridden, though occasionally riding in a carriage. His utterance was impeded, and not intelligible to those unaccustomed to it; and to such persons he appeared childish.

After he had recovered from the severity of the attack, his wife died, and seven months after that, he married her sister. Nineteen months subsequent to this event, he made a will, giving to her a life interest in all his property, and dividing the capital among his and her relatives. The will was prepared by a solicitor in his presence, carefully read to and signed by him, and the three witnesses to its execution, concurred in his being mentally capable of making it. His nearest relatives by blood, were two nieces having families, and another an infant; and he gave to the three, five-eighths of his estate after his wife's death. There was conflicting testimony as to his mental capacity, but the court sustained the devise. And there being sufficient mind, and the weight of evidence being against the allegation of undue influence, the court pronounced against that allegation.

The court forbore to direct an issue, (where it would otherwise have resorted to one,) because of the death of witnesses and the great lapse of time; the testimony having been taken eighteen years before the hearing.

A decision of the Chancellor, against the validity of a will, on the ground of the decedent's mental incapacity, reversing the surrogate's decree admitting it to probate; does not decide the question as to its validity as a will of real estate, either in the court of chancery or any other court.

The deposition of a witness, taken down by the proper officer after he was sworn, but which he refused to sign, was allowed to be read in evidence.

October 14, 15, and November 3, 4, 5, 1845; March 9, 1846.

THE bill in this cause was filed, in March —, 1828, by James B. Clarke and Eleanor his wife, of Brooklyn, Kings county, and Peter Clarke and Maria his wife, of Mentz in the county of Cayuga, against Diana Fisher, (in the bill called Diana Rapelye,) Samuel A. Willoughby, Magdalena Cornelia Fisher, and Roswell Saltonstall and Catharine his wife. During the pendency of the

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suit, Diana Fisher became the wife of Lemuel Sawyer, who was thereupon brought in as a defendant; and James B. Clarke dying shortly before the hearing, the suit proceeded in favor of the surviving complainants.

The bill stated that the two Mrs. Clarke's were the only surviving children, and the only heirs at law of George Fisher, who died in 1787, of whom John Fisher, late of Brooklyn, was the brother, and that they are the sole heirs at law and nearest of kin of John Fisher.

That John Fisher, being sixty-nine years old and upwards and seised and possessed of a large real and personal estate, on the 3d of May, 1823, was afflicted with a violent stroke of apoplexy, which deprived him entirely of the use of his limbs, and of his speech, and for the time prostrated and almost destroyed his mental faculties, rendering him helpless in body, and in mind imbecile and totally incapable of thought. At that time, his wife Cornelia, formerly Rapelye, was living, by whom he had one child, a son who died under age some years before this event. That the disease of apoplexy, under which Mr. Fisher lay for some time in the situation described, gradually and finally turned to and terminated in *palsy*, under the influence of which disease he continued permanently, and by which he remained deprived almost entirely of the use of his limbs and speech, and so weakened, deranged, imbecile and unsound in mind, as to be unable to comprehend, except in a very slight degree, any thing that was said to him, and entirely incapable of comprehending or transacting any business whatever.

That his wife Cornelia died in February, 1824, but previously she had endeavored to procure him to make a will and used violence upon him to extort one from him; and in order to put an end to her abusing him, J. B. Clarke at her request, though convinced of Mr. Fisher's incapacity to make a valid will, prepared a will and procured him to execute it. By this will, a great proportion of his estate was given to his wife Cornelia. If not lost or destroyed, the will is in the hands of Diana Fisher. That the sickness, death and funeral of his wife, appeared in some degree to rouse for a short time, (but not exceeding one or two weeks after her death,) the mental faculties of Mr. Fisher,

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so that he appeared to comprehend in some degree, what was passing around him, and to understand in some measure what conversation was addressed to him, and was able to answer partly by signs and partly by speech. But no favorable effect was at any time produced on his bodily health or strength, and he remained entirely palsied and helpless in limbs and body. His mental faculties began to droop and decay after the one or two weeks before stated, and he speedily became inadequate to comprehend or understand conversation addressed to him, and totally unequal to the transaction or comprehension of any business whatever.

That such faculties were in a better state during the fortnight or thereabouts immediately succeeding the death of his wife, than at any other period from May 3, 1823, until his death; and during that short time only, was he able to execute a valid will, if indeed he were capable during that time, which though the complainants believe, they are not satisfied of and do not assert.

That before the death of his wife, her sister Diana Rapelye, took up her abode in his house, and upon the death of his wife, with her niece Helen D. Hawksworth, who also resided there, took the whole charge and superintendence of his person, to the exclusion of his relatives, and against their wishes; especially so as to Mrs. Eleanor Clarke, who resided near by, and desired to take such charge and superintendence herself. That immediately after Mrs. Fisher's death, Diana and Mrs. Hawksworth attempted to procure him to make a will, and within the fortnight before mentioned, procured his consent to have one drawn and executed. That thereupon Mr. Doughty, a lawyer, went to Mr. Fisher's house and procured his instructions; which were intelligible, given without the suggestion of any one, and with an understanding and comprehension on his part of their meaning and effect. The will was drawn accordingly, carefully read to him, and his clear assent given to it, and he duly executed it. By this will, his property was left to the two Mrs. Clarke's, except certain legacies, and an annuity to his brother Lawrence Fisher. The will is in the possession of Diana Rapelye, *alias* Fisher. Mr. Fisher was then in a sounder state of mind, and

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better able to execute a will, than he ever was afterwards, and the complainants to relieve him from the solicitations of those around him, and secure his peace and comfort, acquiesced in and permitted the execution of the will, though they were not and are not satisfactorily convinced that he possessed sufficient mind to make a valid will. Diana and Mrs. Hawsworth violently opposed the execution of this will, and declared it should be revoked and annulled.

That shortly after its execution, Fisher's mind sunk from the temporary intelligence in which it had been, and in a short time he became imbecile, unsound in mind, unable to understand except to a very limited degree what was spoken to him, or was passing around him, and totally incompetent to transact business of any kind. As to his bodily health, it remained the same. He was paralysed in his limbs, unable to rise or in any way to help himself or satisfy his natural wants, he could articulate no more than two or three words in succession, and those very imperfectly. And by reason of his situation, he became entirely subject to and under the control of those having charge of his person, who were Diana and Mrs. Hawsworth.

While in this state, and incapable of understanding business, those persons and Ann Smith a sister of Diana, fraudulently combined to revoke the will last mentioned and procure one in their favor. They took upon themselves the entire management of all his concerns and business, his moneys, rents, household affairs, &c. signed his name to receipts and checks, without his assent or knowledge. They were uncivil and insulting, and used opprobrious language to Mrs. Eleanor Clarke, when she visited her uncle, and finally prevented her in a great measure from visiting him. That in furtherance of their projects, they urged Mr. Fisher to get married, and finally procured a marriage ceremony to be performed between him and Diana Rapelye on the 31st of October, 1824, without the knowledge of any of his relations or former friends, none of whom, except his brother, were present. At that time, he was palsied, and entirely helpless and impotent in body, and his mind so prostrated that he could not understand the meaning of the marriage ceremony, or

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give any valid assent thereto. No alteration in the mode of life of Mr. F. and Diana, ensued on the marriage, and they never cohabited together as husband and wife, except so far as she thereupon took the whole control of his household and other affairs. The complainants charged that the marriage was null and void.

That on the 2d of May, 1827, Diana and Ann Smith procured a will to be drawn for his execution, by B. B. Phelps, a lawyer of Brooklyn. That the instructions for drawing it, were given by Diana as being his answers to questions put in Mr. Phelps's presence, and which answers were almost entirely unintelligible to him; and Fisher was too feeble and unsound in mind to comprehend what was addressed to him. Among other suggestions which she made, was to insert as a legatee and devisee Magdalena Cornelia Fisher, represented by her as the daughter of his brother George Lawrence Fisher, when she knew that this Magdalena was not his daughter, but was a suppositious child, falsely put forth as his child; and Diana had her name thus inserted, to give color and plausibility to the scheme of the will. That Mr. Fisher was made to sign and acknowledge the will prepared by Mr. Phelps, but he did not understand the effect of his acts, and he was destitute of a sound and disposing mind, and the will is void. The bill then sets forth the will, in these words, viz.

"The last Will and Testament of John Fisher, of the village of Brooklyn and county of Kings.

I, John Fisher aforesaid, considering the uncertainty of this mortal life, and being of sound mind and memory, blessed be Almighty God for the same, do make and publish this my last will and testament, in manner and form following, that is to say : *First.* I give and bequeath unto my beloved wife, Diana Fisher, the house and lot number thirteen, on the corner of Front street and Dock street, in the village of Brooklyn and county aforesaid; it being my messuage or house wherein I now live, together with all the privileges and appurtenances to the same, to have and to hold the same forever.

Item. I give and bequeath unto my beloved wife, Diana, all

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my money which I have in the Bank of America, being two thousand dollars, and also in the City Bank, and also in the Merchants Bank, and also in the Long Island Bank, in the village of Brooklyn. It is my intention that my wife shall have all my money in the aforesaid banks, be the same more or less.

Item. I give and bequeath unto my beloved wife, Diana, all my personal property, either in money, bonds, notes or other securities, including rents due me, and furniture in the said house.

Item. I hereby give and bequeath unto my beloved wife, Diana, her heirs and assigns, all my freehold estate whatsoever, to hold to her the said Diana, her heirs and assigns forever.

Item. I hereby give and bequeath unto my little niece, Magdalen Cornelia Fisher, daughter of my brother Lawrence Fisher, deceased, at the decease of my beloved wife Diana, the one-fourth part of all my estate, both real and personal, and the interest of the one-fourth part of my real and personal property to be paid her yearly for her education.

Item. I give and bequeath after the death of my wife Diana, unto my beloved relations, to wit: the heirs of Maria Clarke, wife of Peter Clarke, and the heirs of Eleanor Clarke, wife of James B. Clarke, the heirs of Ann Smyth, wife of Charles Smyth, and the heirs of Isaac Rapelye, to be equally divided among them share and share alike, of the remaining three-fourths of my real and personal estate, meaning and intending that my niece, Magdalen Cornelia Fisher, daughter of my brother Lawrence Fisher, deceased, shall have one-fourth part of my said real and personal estate as aforesaid.

Lastly. I hereby appoint my beloved wife, Diana, my executrix, together with my beloved friend Samuel A. Willoughby, of the village of Brooklyn and county aforesaid, my executor of this my last will and testament; and I do hereby give unto my said executrix and executor, authority and full power to sell and dispose of all, or such parts of my real estate, houses, lands, &c., as they may think best and proper, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal,

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this second day of May, one thousand eight hundred and twenty-seven.

JOHN FISHER. [L. s.]

Signed, sealed and delivered, in the }
presence of }

WM. CORNELL,

B. B. PHELPS,

MATILDA JEWETT."

The bill further stated, that Mr. Fisher continued in the same paralyzed and prostrate state of body and mind after he signed this will, until he died on the 29th day of June, 1827, without having signed any other instrument in writing than those above mentioned, to the complainants known.

That the two Mrs. Clarke's, either under the second will set forth, or as sole heirs and next of kin, became thereupon entitled to his real and personal estate. That G. Lawrence Fisher, his surviving brother, died on the 12th of April, 1826, without issue. That as a part of their design upon the property of John Fisher, Diana and Ann Smith, on the 25th day of December, 1825, after a long series of threats, mingled with entreaties, induced Lawrence Fisher, a widower, without issue, to marry one Catharine Seaman, at the house and in the presence of his brother John; Lawrence being at the time a lunatic, deprived of his senses, and incapable thereby of contracting marriage. He continued a lunatic, and on the 25th day of January, 1826, was on his pretended wife's application, taken to a lunatic hospital, and there remained until his death. That she thereupon, with the aid and instigation of Diana and Ann Smith, falsely gave out that she was pregnant by him, and went about with that appearance, and early in November, 1826, obtained an illegitimate female infant from the alms-house, and gave out that it was her own issue by Lawrence Fisher, and has ever since called it Magdalena Cornelia Fisher. That this Catharine Seaman, or Fisher, married Roswell Saltonstall in 1826.

That since the death of John Fisher, Diana has continued to occupy his dwelling house, and has taken possession of his other real estate.

The bill claimed that the will of 1827, if otherwise valid, was void for repugnancy ; and is so obscure and contradictory, that it requires the construction of the court. The bill then submitted several different views of the meaning of the will, and its proper construction, if established. That on the will being propounded before the surrogate of the county of Kings, the complainants opposed its probate, but on the 25th day of February, 1828, it was adjudged by the surrogate to be a valid will, and admitted to probate, and letters testamentary granted to Diana, and S. A. Willoughby ; and that the complainants have appealed to the chancellor from the surrogate's decree.

The bill prayed for an answer on oath ; for an issue at law of *devisavit vel non* ; that if the will be found invalid, Diana and the executor be decreed to give up all the property and papers of the decedent, and account for all they had received ; for an injunction and receiver ; that if the will be declared valid, the gifts therein to Magdalena Cornelia Fisher should be declared void ; and the other clauses and provisions of the will should be construed and expounded by the court, according to the complainant's views of their effect, and the personal estate secured, if Diana had any life interest therein ; and for general relief.

The answer of Diana Fisher and Samuel A. Willoughby, admitting the complainant's relationship to John Fisher, his family and death, and such other facts stated in the bill as are not mentioned in this abstract, was substantially as follows ; (Willoughby answering chiefly on information and belief, except as stated :)

They admitted John Fisher's apoplectic attack, in May 1823, and its immediate effect on his mind and body, as charged in the bill, but said that he was then only sixty-six years of age. That the apoplexy finally turned to and terminated in the palsy, and he continued permanently more or less under the influence of the latter disease, and by reason of it was unable to use his limbs freely, and at times spoke very indistinctly ; but Mrs. Fisher denied that he was so weakened, deranged, and imbecile and unsound in mind, as to be unable to comprehend, except in a slight degree, what was said to him, or that he was incapable of comprehending or transacting business of any kind, except during a

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short period, after his apoplectic attack. Willoughby stated that he never visited Fisher after that, except once in the spring of 1827, when the latter appeared perfectly sound in his mind ; and he always heard while Fisher was alive, that he was able to transact any kind of business, except just after his attack in 1823.

They traversed the charge as to Mrs. Cornelia Fisher's conduct towards her husband in procuring a will, and her efforts to have one made. They admitted that James B. Clarke prepared such a will as is first mentioned in the bill, and that it was executed by John Fisher during her life time, and Clarke and the witnesses to the will believed him capable of making a valid will, and the defendants aver that he was so capable.

Diana Fisher denied that his first wife's death produced the effect on Fisher's mental faculties stated in the bill ; or that they were in a better state for a fortnight or some short period after her death, than they were between May 3, 1823, and his death ; or that it was only during that short period, that he was capable of executing a will.

The answer stated that Diana came to live at Fisher's house on the 2d of June, 1823, as the companion of her sister, Mrs. F., at the request of her sister, and of Mrs. Eleapor Clarke, and with Fisher's approbation ; and she resided there till his death. At the death of Mrs. Cornelia F., Mrs. Hawksworth, who then and previously resided in the house, took the whole charge and superintendence of the domestic affairs of F., and the principal care of his person devolved upon her. The answer denied that any of his relatives were excluded or deterred, or prevented from visiting him, or from his care or charge, or from bestowing upon him all the attention and care they chose ; or that Diana was ever uncivil, or used insulting or opprobrious language to Mrs. Clarke ; or that Mrs. Hawksworth ever was or did, except once when Mrs. C. found fault with some domestic arrangement of Mrs. H., and there was warmth and harsh language on both sides.

The answer denied that after Mrs. C. F.'s death, Diana and Mrs. H., or either of them, made any attempts to procure Fisher to make a will ; but it admitted that as Diana understood, Mrs.

Eleanor Clarke desired to have such will made to shut out F.'s German relations. That four days after Mrs. C. F.'s death, such new will was executed by Fisher. That Doughty first drew a codicil to the former will, which from some cause unknown to the defendant, was not executed, and he then drew a will, such as is stated in the bill, and it was executed by Mr. Fisher. Jas. B. Clarke was present at its execution, and appeared to control and manage the business. Diana and Mrs. Hawksworth were requested to leave the room before it was read to F., and no one was permitted to be present then and at its execution, except Clarke and Doughty, and the persons invited by them. The answer denied that Fisher's mental faculties were then in a better state than they had been for several months previous, or than they were from thence to the day of his death. The defendants knew nothing of Mrs. Ann Smith's acts in regard to the will, or of the alleged instructions to Doughty; and they denied the alleged interference with its execution, and threats subsequent thereto.

That within a month after Diana's marriage with Mr. Fisher, he expressed his determination to cancel that will, and sent for it, and took it in his hands and tore the seal from it for the purpose of revoking it.

The answer denied that Fisher's mind began to sink and decay shortly or at any time after that will was executed; or that he became imbecile or unsound in mind after that, as charged in the bill. It stated on the contrary, that the state of his mental faculties improved thereafter, and during the last year of his life, they were stronger and sounder than when that will was executed. It denied that he was unable during that period, to rise or help himself, or satisfy his natural wants; or that from his incapacities or any cause, he became entirely dependent upon or under the control of those having the charge and superintendence of his person. His bodily health and condition were very much impaired.

The answer denied that there was any fraudulent combination to revoke the will, or that there was any attempt by Diana or any one with her assent, to avail herself of the weakened and

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passive state of Fisher's mental faculties to procure a will or disposition of his estate in her favor.

After his first wife's death, Mrs. Hawksworth with his assent managed his household affairs, but according to his direction and wishes ; and under his supervision and direction, managed his business and concerns ; but she paid no money, except small sums for current family expenses, and gave no receipts and signed no checks, without consulting him and obtaining his assent. Diana had nothing to do with any of these matters until after her marriage.

The answer denied that Fisher at any period after his first wife's death, was incapable of transacting or understanding business of any description, or was subservient to or dependent upon those having charge of his person, by reason of his mental imbecility or unsoundness of mind, or from any other cause.

The answer denied that there was any combination or agreement to procure Fisher to marry Diana, or that she or Ann Smith or Mrs. Hawksworth ever urged or persuaded him to marry anybody, or said any thing to him to that effect, and it denied all the charges in the bill on that subject. It admitted the marriage between F. and Diana, and that none of his relatives, except his brother, were present ; but it denied that it took place without the knowledge of his relatives and former friends. Fisher at that time though enfeebled in body, was not entirely helpless or impotent. His mental faculties at that time, were little if at all affected by his disease. He comprehended the meaning and effect of the ceremony, and gave the clergyman and witnesses most clear and satisfactory evidence of his capacity. The answer denied that no change took place in their manner of life after the marriage, and avers that it was actually consummated, and ever after during his life, they cohabited together as man and wife.

The answer denied that it was ever agreed between Diana and Ann Smith, that any will should be drawn ; or that any will was ever drawn with intent to avail herself of the alleged weak and imbecile state of Fisher's mind, to induce him to execute it. It averred that the last will was drawn at his express request, and at his request Diana sent for Mr. Phelps. That Fisher's conversation not being so intelligible to strangers, as to those familiar

with him, she inquired his wishes from time to time while the will was framing, and truly repeated the same to Phelps, who wrote down the same and read it to Fisher, and received his assent to it before writing down any other answer. And this course was pursued as to all the items of the will. The answer denied giving any instructions to Phelps, except by thus repeating to him what F. said or directed; and denied making any suggestion to him as to the disposal of his estate, except that she asked him what he intended to do with Magdalena Cornelia Fisher, whom Diana believed was his niece, and of whose legitimacy, she had then never heard or entertained a doubt. It also denied that F. was then incapable of comprehending what was said to or inquired of him, or assented to whatever she addressed to him, without understanding it. On the contrary he was then perfectly sound in mind, and competent to understand every thing that was said to or inquired of him, and as she believed, did perfectly understand every thing which she or Phelps said to him. The answer denied any fraudulent purpose or intention in mentioning Magdalena's name; but Diana mentioned her name, because she believed Magdalena as his niece, was entitled to his attention and bounty.

The answer then stated the drawing of the will by Phelps from his memoranda, during which Diana was absent from the room, and Phelps read it slowly to Fisher, who clearly and distinctly assented to it, and then signed it and executed it in proper form. That he at that time perfectly understood and comprehended the will and the effect of his acts, and signed and published it of his own free will, uninfluenced by the suggestions of any person. That he had all the requisite intelligence to make a will, and possessed a sound and disposing mind, memory and understanding.

From the day of its execution till the day of his death, Fisher's mind was sound and competent to transact business, and his bodily health continued the same as it had been for several years before, and he sat up in his chair nearly half of the day that he died. That he signed and acknowledged four deeds conveying real estate, the day preceding the day of his death, all of which were sent to him for execution by James B. Clarke, and were

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brought by his son Edward, and were executed in the latter's presence. That after the will, till his death or near that date, Fisher's mind was sufficiently sound to comprehend and confirm a will, and to transact any business.

The answer insisted on the validity of the will, and of the marriage, and that by virtue of and under the will, the estate of Fisher was vested in his wife Diana. It denied any participation or knowledge in or of the alleged fraud perpetrated on Lawrence Fisher, and the supposititious issue produced and set up by his wife; and it denied that he was a lunatic when married, or was deprived of his reason. It also traversed the menaces and entreaties, and other matters stated in the bill, against the propriety and validity of that marriage. It admitted that some time after his marriage, he became a lunatic, and was confined till his death, but the defendant was ignorant upon whose application; and she was wholly ignorant of any falsehood or deception in respect of his alleged issue. She believed the child was the lawful child of George Lawrence Fisher.

By the answer, Diana Fisher claimed the whole estate of John Fisher as her absolute property, and that the latter clauses of the will being repugnant to the first, were inoperative. But she avowed her readiness to conform to the decision of the court, if it should decide that she took only a life interest under the will.

The cause was put at issue by a replication. The infant answered by her general guardian. Before the adults had put in their answer, the chancellor on an appeal from the decree of the surrogate of the county of Kings, granting probate of the will of John Fisher, reversed that decree on the 28th of August, 1828, and adjudged that the will was invalid as a will of personal estate. (*Clarke v. Fisher*, 1 Paige, 171.) An appeal was taken from the chancellor's decree, to the court for the correction of errors, but before it was argued, a compromise was made as to the personal estate of the decedent, and an arrangement as to the rents and profits of the real estate, during the pendency of this suit. The personal property thus ceased to be litigated.

At a later period, under the sanction of the court, an agreement was made by and between the complainants and the guardian

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ad litem of the infant, Magdalena Cornelia Fisher, by which the latter was to relinquish, for a specific sum, all her claim to the estate of John Fisher; and the decree in this suit was to carry this agreement into effect, irrespective of the result as to Diana Fisher.

In the controversy before the surrogate, on the probate of the will, in 1827, the parties had gone fully into the testimony bearing on its validity, all of which was taken in writing by the surrogate, and was printed on the appeal from the Chancellor's decree. This suit having slumbered a great many years, it was finally agreed, on its again moving, that each party should be at liberty to read at the hearing, the testimony so taken before the surrogate, or any of it, in the same manner as if it had been taken before an examiner in chancery. Accordingly, no other testimony was produced or read on either side.

The following is a synopsis of the testimony read at the hearing; stating in general terms, that portion of it given by others than physicians, which related to the period previous to the death of Mrs. Cornelia Fisher.

BENAJAH B. PHELPS, for the defendants, testified that he was one of the subscribing witnesses to the will. He saw Mr. Fisher sign it in his presence, and that of one of the other witnesses. Mr. F. acknowledged the will in the presence of all three, by replying yes, to the inquiry if he acknowledged his signature to the will and as his last will and testament; and all three witnesses subscribed it at the same time, in the testator's presence. When he signed the will, he was sitting in his chair near the bed, and wrote on a small stand placed before him. The witness wrote the will. On his arrival, Mrs. Fisher told F., who was in bed, there was a person to write his will, and asked him if he was ready. He inclined his head, using a word which the witness understood to be, *yes*. Mr. and Mrs. F. then conversed about the disposition of his property. Witness could not understand all F. said, and received some explanations from Mrs. F., and in some instances applied to F., before writing the memoranda from which he drew the will, to ascertain if Mrs. F. had repeated F.'s ideas correctly. He made memoranda of the testator's wishes in this mode, and after completing those, he forth-

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with drew up the will from such memoranda, and when completed, he read it over to F., who assented to it, and then executed it. The witness discovered nothing to the contrary of a sound mind; he was not much acquainted with F. so as to judge, but his impressions were, F. was capable to execute a will. From the conversation with him, the witness judged him to be of sound mind. He seemed to be affected in his speech, and gave no connected directions as to his will, but when the provisions of it were mentioned to him, he assented to them. Each provision was read, canvassed and talked over, in his presence. When they came to that respecting his money, he mentioned the several banks in which it was, but in broken speech.

It was difficult for the witness to understand him on account of his broken speech. Mrs. F. asked him about different parts of his property, how he wished to provide for such and such persons, and he would then reply. While she was out of the room, witness asked him about the provisions made for her, if they were agreeable to his views, to which he assented. When she was about to pay witness for drawing the will, she unfolded ten dollars, and asked F. if she should pay that, or more. He replied, "No, that is enough." Witness discovered nothing throughout, but that the testator possessed his faculties, and was of sound mind. On appointing executors, witness proposed Mrs. F.'s name, and she proposed Mr. Vanderveer. On witness' mentioning that three executors would increase the expense, F. said two were enough, and directed it so. In May, 1826, witness called at F.'s house and saw him, to obtain his assent to certain legal proceedings. He saw Mrs. F., who referred him to F., who was lying in bed. Witness stated the matter to him, and he gave his assent. To all appearance, Mr. F. was in the same state then, as he was in May, 1827, when the will was drawn.

On cross-examination, Mr. Phelps testified, that when he went to draw the will, he first met with Mrs. Smith, the sister of Mrs. Fisher, who told him what he had been sent for, that Mr. F. was sick and weakly, but possessed his faculties to make a will. Mrs. S. was not present when the notes were taken down, or when the will was drawn, nor any one except Mr. and Mrs. F.

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Witness cannot say the testator gave any instructions which were intelligible to him, unassisted by Mrs. F.'s explanations; which induced an extraordinary vigilance on the part of witness to get at Mr. F.'s meaning and intention. Mrs. F. would inquire of him how he wished to dispose of this and that property, and would repeat his answer to witness, who then put the question to the testator, who assented to it. This course was pursued with all the provisions of the will. Witness did not hear Mrs. F. dictate to F. how he should dispose of any part of his property, otherwise than that she mentioned his brother's little daughter, and said she ought to be provided for, and asked what he intended to do for her. Witness had seen the testator only once before this, and does not think his opportunity sufficient to enable him to give an opinion, on which the court could rely, as to the soundness of the testator's mind when the will was made. He discovered nothing in F.'s manner or conversation, which indicated a deranged mind. Instead of repugnance, he appeared by his manner, desirous to have the will drawn. He did not laugh as witness saw, but had a coughing fit, which was caused in part, as witness supposed, by a burst of feeling. Witness supposed his disease was palsy. He was in bed most of the time, and was assisted to get out of his bed into his chair by Mrs. F., and appeared very infirm. He signed the will without any aid, and sat up half an hour in his chair, no one supporting him; and witness left him sitting there. When applied to by witness, as to what Mrs. F. had said, he did not attempt to speak, but gave his assent, bowed his head, and witness understood and believed he said *yes*. Witness recollects that Mr. F. gave his assent in writing.

MATILDA JEWETT, for the defendants. Is one of the subscribing witnesses to the will, and proved its publication and her signature, as stated by Mr. Phelps. Knew Mr. F. twelve or fourteen years, and in her opinion he was of sound mind when he executed the will, and was so at all times when she saw him. He acted as if under no restraint, when he acknowledged it.

Cross-examined. Witness lived with her father and sisters, in the same house with Mr. F., but in distinct apartments, after May 1, 1826. During that time she sometimes went into his

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room to see him, and asked him how he was. He would sometimes answer "better," and sometimes say he was not so well. Occasionally when Mrs. F. was absent, she went to his room and asked if he would have any thing to eat or drink, to which he would bow his head and point to the closet or table, and some times would shake his head. Shortly before his death, when alone, he called her name distinctly, and she believes her sister's name, wishing to receive some assistance. And within a few months of his death, on her helping him to metheglin, he pointed to the decanter, and told her to "take some." She thinks the impediment in his speech, was owing to the soreness of his mouth, as he spoke better at sometimes than at others. While she lived in the house, she thinks the testator had capacity to make a bargain, or to receive and pay money. Mrs. F. managed the affairs of his family generally, bought and paid, and received rents from witness and her sister. He had not been so well a short time before the will was signed, but at that time was better, and as well as he had commonly been. The day before his death, he was sitting up in his chair, and bowed to her as she passed the door, and appeared to be as well as he usually had been. She knew of Mrs. E. Clarke calling two or three times to see him, and a daughter of P. Clarke's, once or twice. They were not ill-treated to her knowledge. The witness named eight or nine persons who sometimes called to see the testator, within her observation.

WILLIAM CORNELL, for the defendants, saw Mr. F. sign the will, and witnessed it. F. took up his pen and signed it, and then acknowledged it. He appeared to be rational, and when witness asked him how he was, he replied, very well. Has no doubt F. was aware he was executing his will. Cross-examined. It was not Mrs. F. who asked him to come in and witness the will. The will was read over by Phelps to F., before it was signed. Witness was in the room half to three-fourths of an hour. Knew F. about thirty years. F.'s body was weak. When he went out to take the air in a carriage, he was helped out of his room into the carriage. When he signed the will, he was no worse, and was much the same as he had been from the 1st of May, 1826, during which time witness lived in the same

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house. His speech was injured, but his intellects did not seem to be impaired. The rooms were hired by witness with the consent of Mr. F. His daughter, Mrs. Jewett, paid the rent.

DR. CHARLES BALL, for the complainants, knew Mr. F. fifteen or sixteen years. Attended him as a physician from May 3, 1823, till the last of July, and thinks he prescribed for him in 1824, and had a fair opportunity of forming an opinion of his mind. His apoplexy for a time deprived him of his senses, and left him very childish. His bodily health afterwards improved a little, but his mind became if any thing more childish. Witness thinks in the latter part of the time, his mind was such, that any one of his particular friends might persuade him to do what they pleased with his property, or to make such a will as would suit them. At times he had lucid intervals and appeared more rational. His mind gradually decayed while witness attended him, up to 1824. This opinion is formed from his crying like a child when spoken to, and his manner being like that of a child, rather than one having his faculties. He would change his former feelings like a child, on being told any thing to divert his mind. He seemed generally to understand the questions witness put to him, but did not try him on any complex questions. Had no occasion to put such, and should suppose he was not capable of answering them. Thinks testator's mind was not sufficiently strong to dwell long on any subject. Apoplexy leaves patients frequently childish, and occasionally idiotic, particularly the aged. Judged him to be about seventy. His complaint terminated in palsy. His brain was partially affected. His speech was very much impaired, though towards the close of July, 1823, it became so far intelligible that some words could be understood. Witness occasionally called on him as a friend, till shortly after his first wife's death, and perceived no difference in the state of his mind. The defect of speech entered with other things, into witness's estimate of the state of his mind. Cross-examined. Attended the first Mrs. F. in her last illness once or twice a day, and during that prescribed once for F. Witness recollects no subject on which he talked with F. except his complaints, but has no doubt he talked on other subjects. At first F. did not understand his questions about his health, but did at the

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close of July, 1823. Does not recollect any conversation with F., or any answer given by him, from which he inferred F. was of unsound mind. Testator's palsy was not a decided case of *hemiplegia*; both hands and feet were affected, and one side more than the other. Palsy would affect the speech, although the mind might not be affected. As a general rule, the mind is weakened by the weakness of the body, but he has known instances of extreme bodily weakness, terminating in death, where the mind was apparently not impaired. The testator laughed and cried like a child. It is not unusual for persons to cry in extreme bodily weakness, though their minds are not affected, except by the disease; but it is not usual for persons to laugh in such circumstances.

J. V. E. VANDENHOEF, for the complainants. While Dr. Ball attended Fisher as a physician, witness went at his direction to electrize Mr. F., which he did from twelve to twenty times, during a period of a month. He concurred with Dr. Ball as to F.'s laughing and crying, and his childish conduct, and thought from the circumstances, his mind was impaired, but did not talk enough with him to judge distinctly. His speech improved during the time.

DR. MATTHEW WENDELL, for the complainants. First saw F. about ten days after his attack, in consultation with Dr. Ball and Dr. Post. Had previously known him as a man of strong mind. At that time, his mind was entirely prostrated, and his speech inarticulate. His attack was a severe one, and was originally on the brain. Such attacks affect the mind more than those commencing in the extremities. Old age usually has an unfavorable effect on the disease, but the aged will sometimes recover from a paralytic attack, after the brain has been affected, and be as sound as ever; but recollects no such instance where the disease was protracted more than three months. Witness visited testator a number of times, and saw him again but not as a physician, (and not more than two or three times,) in 1824, during his first wife's last sickness. He had then improved but little in body, and his mind appeared about the same as in June. He smiled vacantly and looked pleased, when witness shook hands with him. His smile indicated fatuity, and he was then incapable of

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understanding ordinary business in any degree. Thinks if his disease continued a year longer, it would be impossible for him to recover in a degree sufficient to transact ordinary business. Witness never saw him after his first wife's death.

Cross examined. Does not recollect speaking to F. except to say "how do you do," in 1824 ; nor that, on more than one occasion. His visits as physician, were within a month of his first attack. Apoplexy invariably attacks the brain, and it is common for persons to recover their faculties in cases of apoplexy. Palsy uniformly affects the nervous system, and it is uncommon for persons having palsy to recover entirely the use of their limbs. Witness has attended a number of cases of palsy, where the patients recovered, when the attack was *hemiplegia*, which always affects the brain. Does not recollect any cases in his practice, where the disease has continued more than six or eight months or a year, that the patient recovered.

DR. CHARLES ROWLAND, for the complainants.

Knew Mr. F. though not particularly acquainted with him. In March, 1827, witness rented of F. from the first of May, a house next door to the latter's residence. Made the bargain with Mrs. F. in the testator's presence. He took no part in it. She would say, Mr. F. will not agree to this and that, and turn and repeat the same to him, and he would shake his head and utter something which witness understood to mean *no* ; and to the propositions to which she agreed, she said to F. "you will agree to this," and he in the same manner assented. The contract was drawn up there. Mrs. F. dictated to witness and to the testator, and he in no instance disagreed with her. Witness saw the testator in all about seven times, and every time but once in bed. The last time was the end of April. Witness thought his mind was very weak, and that he was entirely under the influence of his wife, and that she could have induced him to execute any contract she pleased. Witness would have hesitated to take an obligation from him for any considerable amount, doubting whether it would have been good in law. Witness thought on the occasions he saw the testator, that he was not capable to make a contract without dictation or assistance. Observed the testator laugh and cry a number of times, but not without cause. In this he appeared very

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childish, particularly his crying. Witness observed, and thought from the testator's countenance there was a want of intelligence. There appeared to be a rolling and staring of his eyes, more or less, which is common in palsy.

Cross examined. Witness cannot say whether the testator was paralytic. Was not called upon to attend him. If he had hemiplegia, his speech and nervous system would necessarily be affected. In severe cases of palsy, it is not uncommon for the patient to have a nervous affection, similar to hysteria, which causes convulsive motions resembling crying, on very slight emotions of the mind. Witness does not recollect any conversation with the testator, except to ask him how he did, and once more particularly as to his health; and he always answered in the negative or affirmative. Judged of his mind, not by what he said or did, but from his doing nothing except through the instrumentality of his wife. As to the latter, all the witness knows is in relation to his lease before stated.

ROBERT LOWTHER, for the complainants. Was employed as nurse for Mr. Fisher, from the first of June, 1823, to May 4, 1824. His bodily health was very poor, he could not walk, his speech was not good. Did not see him grow better or worse, while witness remained there. His mind was pretty weak. He could understand witness, and such subjects as telling witness to shave him and make his bed, but not all subjects. He said one night, that his bed was full of bricks, and people were walking through the room, which was imaginary, but he believed it next day. Witness was in the habit of applying a warm brick to his feet once or twice a night. He was childish, and when people come in, would laugh and cry almost in one breath. He did not transact any business. Mrs. Hawksworth would sometimes consult testator, and he went by what ever she counselled. She and Miss Rapelye, now Mrs. F., lived with him and controlled and managed his affairs. His first wife managed till after her death, and he was governed by them after that. Mrs. H., after his first wife's death, was frequently gibing him about getting married, asking him how he would like a young wife, to which he said he would like it if he was well and in good health, but

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allowed he was in a poor state for marriage. Witness has seen Mrs. H. and Diana rub him, as witness had done to remove his pain, by putting their hands under the bed clothes. Sometimes they rubbed when testator did not complain. Does not know what part they rubbed. Diana very seldom went into his room, until two or three weeks after the first Mrs. F.'s death. The latter insisted on her coming in, but F. objected. Mrs. H. after her death, told F. it would be better for Diana to sit in the room and knit, and keep him company. After she first come in, Diana was there four or five times a day, and before witness left, was there as much as he was, leaving nothing for him, she ordered everything. Mrs. H. asked witness in the presence of Diana and F., how it would do for them to marry. Witness answered it was against the gospel for a man to marry his wife's sister. Shortly after this, witness left. He saw that Mrs. H. and Diana, were working a plan that he should not be there to hear their conversations and actions. He heard them say that too much of F.'s property had been left to Mr. Clarke's people by the second will. About four weeks after the first Mrs. F.'s death, F. having occasion to be angry, had been scolding, and on witness complaining to Diana, she said, "would you mind him? He is crazy and will never be well." She said the same thing more than forty times, while witness was there. Testator was easily excited to anger and easily pacified. Mrs. H. tickled his feet and livened him up frequently, and spoke to him about getting married, and asked him if he would not like to have a wife; to which he sometimes said *yes*, and sometimes *no*. Mrs. E. Clarke, the first part of his illness, was there to see him three or four times a day, but afterwards less frequently, she thinking, and as witness observed, there was no countenance shown to her in the house. Witness heard Mrs. H. and Diana say before F., that she came there to make a bother, and more for his property than from regard to him. During the warm weather, testator was very careless of exposing his person indecently, by kicking off the bed clothes, at which he would laugh. This was in the presence of Mrs. H. and his first wife. Witness would cover him, and he would again kick the clothes off, and then they would laugh with him. He could use only one leg at a time in kicking. He could not use a knife

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or fork. Witness fed him like a child, and sometimes Mrs. H. did. Heard Diana tell Mrs. H., he was not fit to marry, he was a helpless man. Never heard her say any thing to the testator about getting married, except that she once told him if he was married he would get well. Heard Mrs. H. in her presence, frequently speak to him about getting married, and told him he would be well enough, if he would get a wife and spry up, and go out riding. Never saw Diana take hold of him to kiss him, or use any endearment to him. Testator was not in a situation fit to be married, no more than a dead man, for he could not move himself in bed without help. Witness saw no other reason than than that he was so helpless. To the best of witness's opinion, his mind was as unfit as his body. Some things were purchased by Mrs. H. which he rather objected to. His mouth had been well four months when witness left. His difficulty of speech was not from that. There was no difference in his speech, while witness stayed. His face was twice distorted. Dr. Ball called it a fit. Witness saw him twice, just after his second marriage, Saw no difference either in body or mind, but he had only short conversations with F.

Cross examined. Mrs. Hawksworth came there to live in the summer, and Diana in the fall or winter, after witness came. The first Mrs. F. died March, 4, 1824, after which the family consisted of Mr. F., Diana, Mrs. H., the witness, and Sarah Ann Ryder, a servant who was there when he came. Witness's wife came and occupied the front office for a few weeks before he left. Cannot tell whether F., Diana or Mrs. H. dismissed witness. Diana said he got too much wages. Mr. F. told him he ought to get up earlier in the morning. Mrs. H. thought he ought to stay, and made no complaint. Witness saw J. B. Clarke at the testator's, but not as often as Mrs. C. Was there when F. made one will, after the first Mrs. F.'s death. When Doughty drew it, there was to be no one in the room except with him and Mr. F. Mrs. H. had the payment of the money and kept the keys after Mrs. C. F.'s death. It was usual for her to consult F. when she was going to pay money, and about small matters, but she did not altogether consult him. Has heard her consult him about purchasing some such things as wood for the winter. She

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did not consult him about a large bill made for dry goods on Mrs. C. F.'s death, which was partly for her funeral. Mr. F., objected to this bill, said it was too much, there was no occasion for so much expense. He was offended at the purchase and its amount, and told Mrs. H. he never authorized her to get those goods. No other purchase of hers was objected to. Diana neither said nor heard any thing about this purchase of goods. Witness had very little conversation with testator after he left his house, and don't remember as he spoke a word to witness. Witness heard sharp words between Mrs. H. and Mrs. E. Clarke, on occasion of the latter's saying the testator's linen ought to be shifted oftener. Never heard any between Diana and Mrs. C., or any rudeness, offensive remarks, or incivility. Saw no difference in testator's mind while witness was there, except the night when he spoke of the bricks &c., and he was better after that. His mind was no better after his first wife's death, than it had been during the previous part of his illness. On direct examination. The testator's speech was altogether in broken sentences, and not intelligible to strangers.

ROBERT BOGARDUS, a counsellor at law, testified to the testator's appearance and conduct on three occasions when he visited him on business; the first just after his attack, the second about July, 1823, and the third a few months after. He obtained a payment of \$250, the first time, and \$500, on the second visit, from those in charge of Mr. F. According to his testimony, Mr. F. was in a palsied, helpless state; his speech and his intellects much affected, and his manner puerile and foolish. The first time, witness was satisfied that he had no capacity to understand any business, and his mind was not improved when he last saw him, so far as the witness discovered.

Similar evidence of the testator's condition after his first attack, and during more or less of the time prior to his first wife's death, was given by several other witnesses on the part of the complainant.

ISAAC NICHOLS, for the complainants, knew Mr. F. intimately for twenty years. He was a man of strong argument and sound mind. Saw him five or six times after his illness, the last time about February, 1827. Thought him of very unsound mind,

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and always found him in the same situation of mind and body. Mr. F. could not articulate a single word, so as to be understood by witness. Never attempted to converse with him on any subject, except to inquire after his health. Judged he was not in his sound mind, from the fact that he would take hold of the witness's hand, and continue to hold it, and would laugh and cry at the same moment. There was no other fact or circumstance for his conclusion. Witness is over seventy-eight years old.

JOSHUA SANDS, for the complainants. Knew the testator from the year 1780. Saw him twice after the first Mrs. F.'s death, and frequently before that, during his illness. When first taken, he was a little conversible, but grew weaker and weaker. Seemed to be incapable of argument as usual on political subjects, but seemed to be pleased and to understand the matter, when witness spoke about a bank to be established in Brooklyn. This was in 1823 or 1824. After he married Diana R., witness called on him, on behalf of a tenant, to surrender a lease. On addressing F. he made no reply, but Mrs. F. without consulting him, made some remarks refusing the request, and then turned to him and asked if she was not right, and he answered *yes, yes*, loudly and very distinctly, and then turned his head from them. Thinks the testator understood the matter. On being sent for to bring F.'s will, left with witness, he found F. sitting in an easy chair, and handed the will to him. He said *I thank you sir*, twice, and spoke it distinctly. Mrs. F. was there, but took no part in the business. Witness judges the force of his mind was gone, and he was incompetent to form just conclusions in any thing complicated. If a matter of interest to him, was put to him slowly and distinctly, by giving him time, he could judge of it pretty correctly. Cross examined. In what witness says as to mind, he refers to the period before Mrs. C. F.'s death. Was present just before that event, when F. executed a will. J. B. Clarke and the family generally were present, and he made no objection to F.'s competency to make a will. After his second marriage, F. introduced his wife to witness on his first visit, by saying "Mrs. Fisher." Re-examined. From six to nine months after his attack, the first Mrs. F. consulted witness as to F.'s mak-

ing a will. Witness then doubted his capacity to make one, but on going to F.'s, found several of the family collected, Mr. and Mrs. Clarke, Mrs. Smith, Mrs. H., Mr. Vanderveer, and he thinks Diana. Conversed with F. who spoke better than afterwards. A will was prepared, read and fully explained to him, and executed. This on reflection, was after the first Mrs. F.'s death. Some of the females, (not Mrs. C.) made disturbance, being dissatisfied with it, and were requested to retire.

ALDEN SPOONER, for the complainants. Knew Mr. F. sixteen years. In 1824 or 1825, called on F. to pay interest on a mortgage. Paid it to Mrs. H., who gave a receipt. She showed F. the money, and said, there is sixty dollars, and he assented by a nod. Attempted to converse with F. on village affairs, but it was ineffectual. Supposed his mind was gone and entirely imbecile. About a year after, called and paid \$1000 to Mrs. F. in his presence, but without his direction. Only inquired of him as to his health. His countenance was bad, particularly about his eyes. Thinks he had not sufficient mind to transact business then or subsequently. Seemed to assent always to what Diana and Mrs. H. said, and to answer *yes* or *no*, as Diana dictated. In February, 1827, witness called to solicit from F. donations for the Greeks, and also for the poor of Brooklyn. Heard nothing from him except his assent by a nod, to Mrs. F.'s proposal to give two dollars. He attempted to speak, but witness could not understand him. Thinks Mrs. F. consulted him as to the object of the donation, and he said something in answer. Testator's countenance appeared void of intelligence, and at one time he appeared to laugh and cry. Cross-examined. Does not know as Mrs. H. expressed any opinion to which F. assented. Or that Diana did, on either of his three visits. When there in 1825, she told witness F.'s health was better.

D. WRIGHT, for the complainants, called with Mr. Spooner to solicit donations for the Greeks. F.'s wife asked him if he would give for the Greeks, or the poor of Brooklyn. He answered through her, he would give two dollars for the latter, and nothing to the Greeks. He cried as he laid in his bed, and tears ran down his cheeks, appeared to be childish and foolish, half laughed and half cried.

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A. TITUS, for the complainants, saw the testator four times in the summer of 1826, and twice helped him into his carriage. He could not talk so that witness could understand him, but mumbled over something, and he cried without any apparent cause. Witness thought him as unfit for business as a child.

F. HOPKINS, for the complainants. Is secretary of the Brooklyn Fire Insurance Company, which had an office, about three years before his death, in the front part of F.'s house. He paid the first two or three quarter's rent to Mrs. H., and took her receipt for F. For the next two quarters, has the testator's receipts. Once was asked by one of the family, to go up stairs and see F. destroy a paper. Went up and saw him sitting in his chair, tear a seal off a paper. Mrs. H. and Diana were there. Not a word was said by any one. Could not understand F. when he attempted to speak. In June, 1827, noticed that his tongue was blistered.

H. W. CADY, for the complainants. Saw the testator once in the winter of 1827, while doing joiner's work at his house. Conversed with him, F. could not speak distinctly. Thought he was not in his right senses. Witness thought he was not well attended to, from the appearance of his room and clothing. Saw him again after his death, and laid him out. Found his corpse in a neglected state.

THOMAS LAWRENCE, for the complainants. (The deposition of this witness was taken down by the surrogate in the usual manner, and he refused to subscribe it after it was completed. The defendants objected to its being read for that cause, and a like objection had been taken before the surrogate. It was read subject to the objection.) He testified he was very intimate with the testator. Saw him frequently in the early part of his illness, occasionally after his first wife's death, and once just after his second marriage. Thought he was much under the influence of Mrs. H., Diana, and her sister Mrs. Smith. Did not converse with testator about business, as he thought he was not capable to understand it. He looked very different from formerly, had a vacant look of the eyes, and he could not converse. Did not always appear to know witness. Does not remember seeing him cry or laugh during any of his visits. Discovered no differ-

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once in his mind while he visited him, and cannot tell whether it grew better or worse. Cross-examined. While F. was very ill, in his first wife's time, there was some dissatisfaction on her part, as well as Mrs. E. Clarke, as to F.'s will; and witness brought them together, with a view to an amicable arrangement as to his property. Witness thought there was no will and there ought to be one, and that one might be made, if the two heads of the family could agree.

REV. H. U. ONDERDONK, for the complainants. Mr. F. was a communicant of St. Ann's Church, Brooklyn, of which witness is rector. Called to see him several times during the first two or three months of his illness, as his pastor. Saw him again during Mrs. C. F.'s last sickness, and once or twice after his second marriage. Attempted to converse with him, principally on religious subjects. Succeeded very imperfectly, owing as he thinks, to F.'s imperfection of speech, and the prostration of his intellects; and also because Diana Rapelye would reply, sometimes after speaking to F., and sometimes without. Witness regularly pursued medical studies, and practised as a physician four years in the city of New York. The state of F.'s mind was such when witness visited him, that he should have deemed it highly dishonorable to have made any bargain or contract with him, unless his friends representing his interest, had been present and assented. Nothing occurred at witness's visits to show that F. was under Diana's influence, or whether he was or not. Suspended his visits as well on account of her interference, as because he thought F. from the state of his mind, incapable of deriving benefit from conversation with witness. At the two last calls made by witness, the testator's mind appeared to be in the same condition as before his first wife's death, and not at all improved. If the testator's friends had requested him to be married for his own benefit, witness might have been induced to perform the ceremony, but otherwise would have declined on account of the imbecility of his mind.

Cross-examined. Visited F. frequently during the first two or three months of his illness, then seldom till the first Mrs. F.'s last sickness; is not sure of but one visit then, and after that has no distinct remembrance of seeing him till after his marriage.

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Does not recollect any remark or question addressed by him to F., during or after the first Mrs. F.'s illness, which required an answer, and to which he gave none.

Direct examination. Stayed ten or fifteen minutes at his visits, and on each attempted to do his duty to F., as a clergyman, and was satisfied that the attempt was vain. Recollects now, Diana's interference was after the first Mrs. F.'s death. His remembrance of dates and times in this case, is imperfect.

JOHN PINTARD, was a long time secretary of the New York Historical Society. Testator for many years, when witness met him and opportunity served, was in the habit of relating the story of his purchase of the papers of Lord Stirling, which is referred to in the testimony of Dr. Watts, for the defendants. He was fond of dwelling on the subject, and considered it a pretty important epoch in his life.

CORNELIA PARK, for the complainants. First saw testator about six months after his last marriage. Once after that, saw him at Mrs. Ann Smith's at Bloomingdale, near where witness resides. He was then carried from one room to the other to eat his dinner. Did not hear him speak a word, and he did not appear to take much notice of things about him. Believes he noticed the conversation, and laughed at times when they were joking. Has not an opinion whether he was rational or not, as she did not hear him converse. Was at his house and saw him the day the last will was made. Did not speak to him, because Mrs. Smith told her in F. and Diana's presence, that he was too low to be spoken to. Diana said she did not wish any one to speak to him, because he was too low. She and Mrs. S. both told witness they did not want it known he was so low, because the house would be run down with visitors, and asked her not to mention it. Mrs. S. told her, he had made his will that day, and requested her not to mention it; and she repeated both requests as witness was leaving the house, and told her she expected he would die soon. Witness however mentioned it the same day at her son's in Brooklyn, and she believes it was soon known over the village. Mrs. Hawksworth is insane, and has been since 1825.

ELIZABETH DENYSE, for the complainants. Knew F. about

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twenty years. Mrs. Hawksworth is the daughter of Mrs. Ann Smith. Knew her and her mother and Diana intimately, and exchanged visits with them frequently in 1824 and 1825, while she kept house for Lawrence Fisher. After Diana's marriage, she said now she was married, they wanted a new will, the old one was done away, it was good for nothing. Diana, two or three times, urged Lawrence to coax his brother to make a new will to cut the Clarke's off, as by the old one they got all. The other females made similar applications to Lawrence. Saw the testator frequently during 1824 and 1825, and once in June, 1826, and frequently talked to him. Sometimes he would answer *no* by shaking his head, and *yes*, by speaking it indistinctly, but generally would take no notice of her. Thought he had no more mental capacity to transact business, than an infant. Diana and Mrs. H. appeared to control every thing, and he agreed to whatever they said. Witness bought provisions for the house, by their direction. F. seemed to care nothing about the purchases, or to understand any thing in relation to them. About six weeks before Lawrence was married, witness went over to tell F. and his wife that L. was wild, and was destroying his property. F. took no notice of it, and Diana told her in his presence, it was none of her business, let him spend it. The woman who married him was present at F.'s. L. was still deranged the day he was married. Diana before that, while he was deranged, told him to get married, that she had a young woman as a wife for him. Left L.'s house just a week after his marriage. (The testimony about the suppositious child is omitted. This witness signed her deposition by making her mark.)

C. M. HEMPSTED, for the complainants. Robert Lowther has been in his employ a year or two as a laborer, and so far as witness knows, he is honest, sober and true, and has never suspected him of want of veracity. He has twenty to forty hands, and has no acquaintance with Lowther, except as a workman in his employ.

SAMUEL JAMES, for the complainants. Was a director of the Brooklyn Fire Insurance Company in 1824, and called with Judge Furman, as a committee, on testator, to rent his house for the company. The women present said he was too sick to attend to

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business. They thought two rooms could be had, but could not say then ; the matter would be talked over, and they would let the committee know. Was there fifteen minutes. F. cried when witness took him by the hand. Had no conversation with F., and Judge Furman had very little. F. looked like a very worn down and feeble man, not calculated to do business, and witness says incapable of attending to it. His utterance was poor, though witness understood him partly. He showed no interest in the object of their visit.

Cross examined. Judge Furman conducted the conversation principally, and the answer was to be given to him. This was in April, 1824.

John Garrison, and Joseph Moser, for the complainants testified to Lowther's good character. They saw him a good deal, but had little intercourse with him.

JOHN F. LAWRENCE, for the complainants. Knew the testator from boyhood, and saw him a day or two after his first attack, when he was very low, and repeatedly during that year, and till December, 1824. During this period, frequently conversed with him. It was difficult to understand yes or no in his conversation. Sometimes he would know witness and there was a little animation in his countenance. At other times, doubted whether he knew witness. Had no long conversation with him, because witness judged him incapable of conversation ; it being difficult to understand him, and he not appearing to comprehend witness's questions. Did not attempt to converse with him after the first two or three times. Testator did not appear to be as well, or to articulate as well, at the close of witness's visits. On the 17th of December, 1824, called to collect \$100, money lent to testator's wife, during the first of his illness. He was sitting in his chair. Explained his errand to the females in the room, and Diana then explained it to the testator. Thinks he said yes ; a check was filled which he signed, and it being difficult to read his signature, Mrs. Hawksworth altered it so as to make it more legible. The testator did not say any thing, or appear to take but little notice of what was going on. Witness thinks he was childish or very like it. Took particular notice of him on these visits.

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Cross examined. Is a cousin of Mrs. E. Clarke. Drew his conclusions as to F.'s mental imbecility, not from any thing F. said, or did, but from his bodily appearance, his countenance, the wild vacant stare of his eyes, his laughing and crying, and his not appearing to comprehend what was said to him. He was incapable of articulating intelligibly. Thinks he was not so well in December, 1824, as he was shortly after his first attack, and he did not articulate so well. The witness T. Lawrence, is the brother of deponent.

N. J. STILWELL, for the complainants. Saw testator once during his illness, about August 1824, and then for twenty or thirty minutes or less, being in a hurry. Had very little conversation, and don't remember what it was about. Thought him unable both in body and mind, to do his own business, and that he had not mental capacity to make a bargain or a will. Testator was in bed, and witness was talking with the other members of his family.

DR. JOHN WATTS JR., for the defendants. Knew the testator a number of years, by sight only. Saw certain papers in the library of the Historical Society, which had belonged to witness's grandfather, Lord Stirling, and which it was said had been obtained from testator; and in July or August, 1826, called on the testator to learn if there were any more of those papers. Found him sitting in his chair, he received witness with politeness, and excused his not rising on the score of sickness. Observed his altered appearance, and remarked some distortion of face, and difficulty of utterance, with the flow of saliva from his mouth. Made known the object of his visit, to inquire as to Lord S's. papers. Testator promptly replied, he had them not, he had given them (and then hesitated a little,) to John Pintard. Witness asked if it was not the Historical Society. He said "they went there, some of them." Then added, "I gave some of them," here he hesitated again as if recollecting, "to a gentleman in Jersey," stopping again, and then added "to Governor Ogden." Witness asked if he gave many of them, or what proportion to Gov. Ogden. He said "he could not say," adding, "but such papers only as related to Jersey." Witness said, "you

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do not recollect whether you gave him many or few?" to which he answered "yes I do, I gave him a silk handkerchief full." He said *not*, in answer to the inquiry if he had any papers remaining in his possession. Witness asked him if he might inquire in what manner he came in possession of those papers. Testator said, "he was passing in the street in New York sometime ago, and observed at a little auction a trunk put up for sale with papers and things in it: he was induced to examine it, and discovered to whom they belonged, and bid for the trunk, and for a few shillings got the trunk and all that was in it: that he had had them for a long time in his house, till somebody made some inquiries respecting them." He then stated those inquiries, and what led to them, and what disposition was made of the papers. He then observed "a gentleman called on me sometime ago concerning these same papers, and was anxious to know whether I had any more of them." He could not recollect who it was. On witness suggesting, was it Gen. Wilkinson, he immediately assented. He closed the conversation by saying, "I have told you now all I know about it." Was with testator at least half an hour, and was struck with the retentiveness of his memory and the promptness of his answers. There was hesitation and embarrassment in his utterance, and nervousness in his manner; but witness distinctly understood him, and did not find it necessary once to make him repeat what he had said. Testator was evidently paralytic, and witness could not help remarking the retentiveness of his memory, because of his shattered appearance. He did not laugh while witness was there, he wept once or twice, and by his manner apologized for it and intimated he was conscious of his situation. Weeping on a slight agitation, is a symptom of this complaint. Weeping is decidedly a bodily affection, but not exclusively, the mind is always more or less affected.

Cross examined. Had never conversed with the testator till this visit. He was capable of uttering a whole sentence, and a short one continuously; but would pause occasionally, if it was a long one. His speech was better when alone with witness, than it was when his attention was attracted by a person's passing through. Witness has seen one attacked with apoplexy, and

insensible for five or six days, and when revived was perfectly helpless, and could not articulate, who improved so far, that at the end of a year or more, he could walk about, articulate pretty distinctly, help himself nearly as usual, and appeared to have recovered in a very great degree, from the impression made on the intellect. It is not unfrequent in these cases, that the moment of greatest amendment, is the moment of greatest danger of another attack. It is a general principle that debility of body enfeebles the mind, but witness has known paralytic patients who have been for years helpless and unable to walk, yet retain a considerable share of judgment, memory and the other faculties of the mind. And he has seen instances of paralysis, where the mind has improved and the body continued much the same. Such cases are not unfrequent. Witness's opportunity to ascertain the state of the testator's mind, was nothing like equal to that of an attending physician. He exhibited the fluctuation of feeling usual in paralytics; their feelings are easily excited. From witness's observations, testator's mind appeared to be a great deal better than he should have expected from his bodily health. Could not see him without associating the idea that his mind was shattered in common with his body. Paralysis always affects the mind more or less, and witness was surprised to find his mind so much better than he could have expected. Weeping in these cases is properly an hysterical affection, and implies a diseased state of both body and mind. Being asked whether this also implied in the testator's case, the witness answered yes. Direct examination. But the witness does not mean to say that the weeping in the testator's case, implied such a disease in the mind as would render him unfit for business.

DR. JAMES CAMERON, for the defendants. Was called as a physician to visit testator during his illness, twice in his first wife's life. Attended him a number of times after her death, and before his second marriage. After that continued to visit him until April, 1827, but not as regularly as before. On his first visits, could not understand the testator. After the death of Mrs. C. F., could understand him generally, and latterly, understood him perfectly. During his first visits, Mrs. Hawksworth explained what he said. From the time witness could understand

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testator, has no doubt that he was of sound mind. He never said any thing to witness which induced witness to suspect his mind was otherwise than sound, or which indicated a want of mind. When witness saw him in April, 1827, his health seemed better than witness had ever seen him before ; he was in good spirits, and conversed freely on any subject which was stated.

Cross-examined. Did not see F. on his first attack. When first saw him, his disease was general paralysis, and he seemed to be affected all over, so as to overcome the nervous system. Became his attending physician soon after the first Mrs. F.'s death, though visited him twice before. Paralysis may or may not affect the mind. Testator's mind was not diseased, so far as witness could perceive, but when the body is severely affected, the mind is less strong than in health. His mind was not any more affected than it would have been in any other disease where the body is equally affected. Never saw testator cry. He usually smiled when witness came. Does not recollect to have heard him laugh out loud, unless something jocular was said. Thinks his impediment of speech, was owing to the want of action of the nerves of the tongue, occasioned by paralysis.

SUSAN J. C. MARTIN, for the defendants. Knew Mr. F. over thirty years. Saw him in May and June, 1827, and had frequent conversations with him. Spent two afternoons with him, from about noon till near dark, during which he was polite enough to sit up. He appeared to speak intelligently. Witness has not the least shadow of doubt but that he was in his sound mind. His speech was much broken, and his tongue very sore, there being a blister on its side, the size of a pea. He showed it to witness, and he spoke with great difficulty, though she understood him perfectly well. He told her he was happy that he had married Diana, as she was very kind and attentive and good to him.

Cross-examined. Witness's mother and Mrs. Fisher's were intimate, and witness was intimate with both the Mrs. Fishers. Has known the present Mrs. F. thirty or forty years ; they were girls together. Mr. F. seemed infirm, but eat hearty. He conversed with as much intelligence as he ever had.

HANNAH PIERSON, for the defendants. In the spring of 1826,

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for between two and three months, was a part of testator's family, eating with them, and passing the day time principally with him; his bed room being the common family sitting room. Frequently conversed with him. When conversing with Mrs. F., he would occasionally join. At times he spoke indistinctly, but witness could always understand him. Strangers could not always, and witness frequently was obliged to explain to them what he did say. His conversation was quite rational. There was not the slightest appearance of unsoundness of mind in him. He was fond of speaking of the revolutionary war, and related a great many anecdotes of it. He was fond of speaking of his property, and told witness how he first made it; spoke frequently of his lands in the neighborhood of the canal, and occasionally of his stocks. He would occasionally shed tears, when speaking of persons with whom he had been intimate, such as his wife and daughter, and officers in the revolutionary army. Never saw him laugh in a childlike or foolish manner. Was frequently at his house, both before and after that stay, and was intimate there till within a few weeks of his death. Saw F. the last time in May, (1827,) and was there about an hour, when she conversed with him. Saw nothing in his manner or conversation which induced her to think his mind was unsound. Visited there in the life time of his first wife.

Cross-examined. Saw and conversed with F. twice before his sickness, and perceived no difference in his mental capacity after that. Thinks it was as good when she last saw him, as when in health. Thinks he could converse on any complicated subject during his illness. He would converse freely with those he liked, very little with others; there was a very perceptible difference. He gave directions as to all his family concerns. Mrs. F. could do nothing without consulting him. Witness was living in New Jersey, and did not see testator during the first year of his illness.

Re-examined. Understood from F. he had been in the army during the revolutionary war. Her acquaintance with him before his illness, was slight. His tongue at times was very sore, owing as she understood to the medicine he took, and at these times his speech was more indistinct than at others.

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JOSEPH DEAN, for the defendants. Is a commissioner to take the proof, &c., of deeds, in Brooklyn. Some time during the last winter, (1827,) James B. Clarke handed to him two deeds, and desired him to take the testator's acknowledgment of their execution. Went with the deeds to the testator. His wife was not at home; found him alone. Told him Mr. Clarke had handed witness the deeds, and wished him to take the testator's acknowledgment. Testator being in bed, took the deeds, and appeared to be reading them for some minutes; his hands trembled considerably. He handed the deeds back to witness, and said to witness, "You read it." Witness took them and read them audibly, and in reading made some mistake which he noticed. After they were read, he said "That is right." Witness being somewhat impatient, waiting for Mrs. F., whose acknowledgment he also wished to take; F. said something about her returning soon, asked witness to sit down, and asked about his family. Witness said a good deal to testator, on purpose to ascertain the state of his mind, and the result was a conviction on witness's mind, that testator had his senses, and knew what he was going to do, and understood the nature of the instruments he was about to execute. If witness had not been so convinced, he would not have taken his acknowledgment. After about three-quarters of an hour, Mrs. F. came in, and the deeds were then executed and acknowledged. Testator then said something about procuring certificates from the county clerk, the lands being out of Kings county. Nothing had been said to lead to this suggestion. Within two years prior to this, witness was sent for to come to F.'s house, to take the acknowledgment of two deeds to the testator, which were executed in his room by Miss Bowles, and he thinks another person.

Cross-examined. He has heard Mr. Clarke say. but he cannot tell whether before or after these deeds were executed, that they were in fulfilment of an old contract. Mrs. C.'s son, Edward, was present, he thinks, when the deeds were handed to him. About a year before that, witness took the acknowledgment of another deed from testator, the necessity of a county clerk's certificate to which, was mentioned by witness in his presence. Knew him before his last illness. He was then a smart man.

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Does not know but by disease his mind may have been weakened. He was unsound in body, and should think his mind might be somewhat weakened, but thinks he was perfectly sane.

The deed the year previous, was in fulfilment of an old contract executed by the testator. On its execution, had a conversation with him; does not recollect its substance, but what he said was perfectly rational. He spoke with some difficulty, and sometimes had to speak it over twice, but witness could understand him. Recollects that on leaving him on that occasion, witness shook hands with him and he cried. On signing the two deeds handed by Mr. Clarke, testator found it difficult to write his name, and as he was finishing his signature, he burst out a crying; which witness thinks arose from his mortification in not being able to subscribe his name with ease. Re-examined. Had no doubt but that the testator was perfectly competent to execute a deed, when witness took the acknowledgment the year previous. Would not have taken it, if he had had the least doubt.

SAMUEL JARVIS, for the defendants. From May, 1825, till testator's death, visited the testator, sometimes once a month and sometimes two or three times a week, as convenient; always conversed with him, and testator became intimate and friendly with witness. At first understood his speech only partially, afterwards learned to understand him well, but some words were difficult to be understood. He conversed with witness about bank stock sometimes, and when the different banks broke, he inquired of witness in relation to them, and asked him several times if they were got a going again. In the spring of 1827, F. had bought a lot, the location of which was to be ascertained by drawing for it, and Mrs. F. desired witness to attend to the business for her husband, and asked him if he would send the money for the lot by witness. He answered "no, he had paid for it already, and was not going to pay for it over again." Mrs. F. who was in a different part of the room, asked him what he said and he repeated it in substance, loudly and so distinctly that witness plainly understood him.

On his different visits, witness remained with the testator, sometimes an hour, sometimes an hour and an half; and several

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times spent the greater part of Sunday afternoons. Always found the testator rational in his conversation. Never discovered any unsoundness of mind in him, to the best of witness's knowledge. Used to converse with him on a variety of subjects. Believed from what witness saw of testator, that if his health had permitted and he could have gone abroad, he would have been as capable as witness of transacting business.

Cross examined. Testator in uttering long sentences, or long syllables, would stop as though he had an impediment in his speech. He was very feeble in body, and was lifted in and out of bed during all witness's visits. Never saw him help himself to any thing, except once when he took a newspaper off a stand, and asked witness to see if there was any thing about the price of stocks. Sometimes he would say to Mrs. F. "my dear, you talk too much." He was more unwell at some times than at others. The worst witness ever saw him, was three or four weeks before his death, and on inquiring how he was, he told witness he was worse, and afterwards put his hand on his heart and said "he had a great deal of pain there," and he screamed out several times while witness remained. Discovered no change in his mind at this time. He appeared more unwell from the first of May last, (1827.) After that he appeared short of breath when he laid down on his back, and would be helped up into his chair sometimes two or three times while witness stayed; at other times found him sitting up, and he would continue up while witness remained. Has seen a gold piece which he wore in his stocking, and was told it was to draw the mercury out. This was mentioned in testator's presence. Testator conversed as freely as a man could do, who had been lying sick so long, and witness could not discover the least defect in his understanding. The subjects were generally on money concerns. Testator told witness last summer (1826,) he had several times rode out, and that some accident happened on one of these occasions. Does not recollect the particulars.

WILLIAM FURMAN, for the defendants. Is president of the Brooklyn Insurance Company. Knew F. from thirty to forty years. In April, 1824, hired a room in his house for their office. Called on F. with the object of hiring the whole house; intend-

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ing the secretary to occupy all but the part wanted for an office. Testator objected to renting the house, and said he would not move out of it. Witness told him the situation was very desirable, and he wanted it very much. Testator wanted to know how it was to be occupied, and witness said for an office for the insurance company. He asked whether the lower front room (in which they then were,) would not be sufficient. Witness told him it would not; the directors would meet frequently, and would want a spare room. He inquired how often their meetings would be. Witness told him, once a month regularly, and sometimes more frequently. He then stated he would let them have the front room, with the occasional use of a back room, which he called a parlor; and then asked what rent they would give. Witness told him, he must set a price, and if reasonable they would give it. He hesitated, as if not prepared to give an answer, and asked witness if it was necessary that he should give an immediate answer. Witness told him it was not, and he might make up his mind and let him know next day. He said he would make up his mind and send him word. Witness said he would call and receive the answer, and the testator appointed a time next day for that purpose. Next day witness called, and F. told him he had made up his mind to let them have the rooms. After some conversation he named the rent, \$150, to which witness objected as too much. He said the bank being there, it would be the best location for the insurance company; and after some other conversation as to the location and price, he told witness the company should have the rooms at \$100, a year, and witness agreed to those terms.

Cross examined. Testator was reputed to be a man of easy circumstances, but not of large property. When witness rented the rooms, a Mrs. Hawksworth was present. Mrs. Diana F. was not present. When he first called, he sat there some time, and saw it was with difficulty the testator spoke; and witness did not at first understand him, but afterwards understood him perfectly. He took hold of witness's hand and held it some time, and seemed very much affected. This was the first time witness had seen him since his illness. Mrs. H. during the conversation made some remarks about the furniture in the back room,

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and asked if it would not be injured. The testator laughed, and said he was not afraid the furniture would be hurt. After this, witness occasionally helped him in getting in his carriage when he went out riding, but had no opportunity to ascertain the state of his mind.

SARAH ANN RYDER, for the defendants. Lived about four years in Mr. F.'s family, up to ten days after he married Diana. After three weeks of his illness, she could understand his speech perfectly. He would hesitate in his speech, as if something stopped it. He could understand what was said to him, as well as witness could. He talked but little, except when spoken to, and then he would always answer and talk. When he was well he talked but little. After his speech became intelligible, she never discovered any appearance of his mind being unsound. His answers to the questions addressed to him, were always rational; she never discovered any thing to the contrary. Mrs. Hawksworth managed his family from Mrs. C. F.'s death, until his second marriage. Upon that marriage, he directed Mrs. H. to give up the keys to Mrs. F., saying it was her place to take charge of the family. Mrs. H. always consulted him before she bought articles or paid money. He was dissatisfied with Robert Lowther's conduct, and more latterly than at first. Lowther was hired at a dollar a day to take care of testator and help around the house. He used to ask to be absent an hour, and stay away half a day, for which testator found fault with him. Lowther was disobliging about the house, and would get mad if asked to do any thing out of the sick room, and finally testator dismissed him. Never knew testator to visit Mr. Clarke's family, before or after his illness. Witness used to go into his room several times a day, and sometimes when Lowther was out, has sat with him a half hour or more. Sometimes took her work and sat there to sew.

Cross examined. Discovered no difference in testator's mind after his sickness from what it had been before; it was equally strong, and knows he was as sensible as before. Could not see but his memory was as good. After the first three weeks, could not discover but that he talked as sensibly as he ever did, but not so easily, as his speech was not as distinct. He always con-

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versed with any person who came in for the purpose of conversing with him. Witness was every day in his room, back and forth. After those three weeks, he had no difficulty in making any person understand him. So far as she observed, his mind was not in the least affected by his disease, after that time. Has seen him cry when his friends came to see him, whom he had not seen in a long time. Never saw him laugh or behave childish. Mrs. H. told her in testator's presence, about three weeks before his marriage with Diana, that it was to take place. Has heard Mrs. H. speak to him on the subject, but never heard her recommend the marriage. Witness was present at the marriage with Mr. and Mrs. Rose, Lawrence Fisher and Mrs. H. and the minister; no one else. Knew Lawrence F.; he used to be there almost every Sunday P. M., and often once a week besides. Has heard him converse there often. Saw nothing to the contrary but that he was in his right mind. No other persons than those named, were invited to the wedding. Testator said he did not want to make a wedding, but to have it private. Mr. and Mrs. Rose lived in one of his houses; she had been a domestic in his family, and was married in his house before his illness. Testator was sitting in his chair when married; he had been up all day. Witness never saw the Rev. Dr. Onderdonk there but four times, twice before his last illness and twice after. Witness complained of Lowther to testator; never heard Mrs. H. or Diana. When witness left, there was a black man there to take care of testator, who had slept in his room. After the marriage, Mrs. F. slept with her husband, and as witness thinks the black man slept in the same room two or three nights after the marriage, but is not certain. Witness was hired to do housework. Was thirteen when she went there. No rate of wages was agreed upon, but when she wanted any thing, the first Mrs. F. was to give it to her.

SAMUEL S. CARMAN, for the defendants. Did not see testator till seven or eight months after he was taken ill, after which saw him pretty frequently till his death, visiting him from once a fortnight to twice or three times a week. Testator seemed to have an impediment in his speech, and at first witness could understand him, but not perfectly. After two or three months

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could understand him perfectly. He always conversed with witness at his visits, and always sensibly, as witness thought. Never until after his death, heard or suspected that testator was not of sound mind. Cross examined. When witness could not understand him distinctly, Mrs. H. or his wife would explain. They appeared to understand him always. He frequently asked witness what the news was in Brooklyn, and what people were doing. Knew him twelve years before his sickness. He was a smart man and of strong mind. Could not perceive that his sickness affected his mind in any degree. Never found any difference in testator's capacity of mind, but sometimes he conversed more than at other times. Never had the least suspicion that his mind was affected. When witness first went in on his visits, testator appeared to be affected in a singular emotion resembling a mixture of laughing and crying, which did not last more than a minute; the laughing first and the crying last. Shortly after his marriage, witness congratulated him upon it and shook hands with him, and he laughed and ordered a glass of wine for witness.

JOHN A. RUSS, for the defendants. Is a midshipman in the navy. Came to board with W. Cornell, his father-in-law, in the same house with Mr. F., on the 2d of May, 1826; was there till the middle of June, again there from September 5th, till November 1st, and after that lived near by and visited Cornell and saw testator frequently till April 13th, 1827. Saw him almost every day, while witness boarded with Cornell, and two or three times a week after that, and generally conversed with him. During all this time, it never occurred to witness that testator's mind was otherwise than perfectly sound, and never suspected it to be otherwise. His conversation was always as correct and rational as any man's, but his utterance was always indistinct and low, and at times he could only converse in a whisper. His answers and observations were always rational, and he always appeared to understand what witness said to him.

Cross-examined. Being asked on what subject F. conversed, witness says he does not recollect particulars, but he recollects when he was about to sail in the Lexington the middle of June, F. inquired where she was going; witness said to the West

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Indies, to which he shook his head and said, "sickly there." He then made some observations in whispers against witness's going there. At another time, he opposed witness's quitting the navy, which he talked of doing. His conversation was about as much in whispers as aloud. Mrs. F. did not generally join in the conversation. Sometimes F. would attempt to make an observation aloud, and before he would get through, would appear oppressed and speak in broken sentences, and Mrs. F. would finish it for him and explain his meaning, and ask if it was so; he would nod his head and say, *yes*.

Re-examined. F. occasionally requested witness to read the newspapers of the day to him, which witness did, and he appeared to understand and take an interest in it. Mrs. F. appeared to be very attentive to the testator.

ABIGAIL DE HART, for the defendants. Spent three weeks with Mrs. F., in June, 1827, and saw testator from twice to three times every day, and had much conversation with him. Believed his mind to be perfectly sound, and had not the least suspicion of any unsoundness of mind.

Cross-examined. He was in a very enfeebled state of body, and did not converse much. Conversed with him on various subjects. With him and Mrs. F., witness conversed on money affairs, and about her own concerns, and what she had better do with a small sum she had. Mrs. F. proposed to purchase lands; testator said "No, stock was better" for witness. He manifested superior intelligence, and more than common understanding, much more than ordinary men. Never discovered the least imbecility of mind, or want of memory. At first could not understand him so well, but afterwards could perfectly. His conversations were not long; he would utter two or three sentences together so as to be understood by any person.

Re-examined. Testator's feelings towards the Clarke's were not very pleasant, as she infers from this. In January last, (1827,) Mrs. F. had received some money, and she said to her husband, you had better make a compliment of \$1000 to each of the Mrs. Clarke's. He said *no*; she again pressed it, and said they had large families. He said *no*, they did not care for him.

ANNE SMITH, for the defendants. Was intimate at testator's

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house, and knew him over ten years ; visited him occasionally during his illness, sometimes stayed all night, and always conversed with him when she went to see him. Always thought his mind sound, particularly on subjects of business. Heard him converse about property, and on the subject of stocks, of repairing his houses, and the like, and had no suspicion his mind was otherwise than sound.

Cross-examined. Is third or fourth cousin to Mrs. F. Testator when well, was a very sensible and polished man. He never manifested any imbecility or weakness of mind on any subject. He spoke intelligibly, and witness could always understand him, and has no doubt any person could. This was so from five or six weeks after his attack, till near his death.

MARGARET DUFFIELD, for the defendants. Visited the testator frequently after his second marriage. About a week after, was there, and Mrs. F. introduced her to Mr. F. as her husband. Went up to F. and wished him joy, and remarked to him, he looked a great deal better. He said he was a great deal better. Told him he appeared to have the use of his limbs, and particularly his hands. He said *yes*, and rubbed his hands together. Asked him whether he could use his feet, and he said *O yes*, and drew up his feet to show he could use them, and stretched them out again. He apologized for being unable to speak fluently, and showed his tongue, which had an ulcer upon it. He said he did not know if the ulcer was occasioned by the badness of his teeth, or the mercury he had taken, that during his sickness they had given him a great deal of mercury. At that time he appeared evidently better, and he afterwards grew better still, and witness saw him walking, leaning on Mrs. F.'s shoulder. Some time last winter, (1827,) witness was there, talking about some of her business with Mrs. F., in the testator's presence. Mrs. F. told witness, I would do so and so; he said, do not do it. Why? said Mrs. F. Because, said he, it is not law, you cannot do it, Mrs. Duffield. Some time after, witness was again there, and testator was sitting before the fire. Mrs. F. was talking about her marriage, and said Mr. F. had formerly made a will, which he had destroyed since her marriage. Witness said to him, Mr. F. in the situation you are, if I was you, I would regulate my

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affairs so as to leave peace behind me. He said to witness, should I die without a will, Mrs. F. will have sufficient. Witness said to him, from what I learn, they intend to contest that too. To which he replied, shaking his finger, let them if they dare, and I will marry her over again. From all she saw of him and heard him say, she has not the least doubt but that his mind was perfectly sound, and she never doubted it. Not more than three months before his death, in conversations with her and Mrs. F., he corrected them as to day and date, as to transactions they were talking about, and then, as on other occasions, his memory appeared perfectly good.

Cross-examined. Was intimately acquainted with testator before his illness. He was considered a man of considerable talents, and genteel in his manners. His disease appeared to affect his body only; his mind and memory were unimpaired, and appeared as good as she had ever known them, and so continued until her last visit, about a week before his death. He appeared as competent to transact business of any kind, as when in full health. Was never present when he made any bargain. Witness is mother-in-law of Mr. Willoughby, one of the executors. Mr. W. was not intimate with testator, and he was surprised when he heard he was appointed an executor in the will.

JOHN SMALLEY, for the defendants. Saw testator at least fifty times after 1825. Conversed with him about the rise and fall of stocks. Could understand him, although he could not articulate plainly. Considered him able to understand business, and to judge correctly in all matters of common business. Never discovered any imbecility of mind in him. Had no doubt of his capacity to make a will. Applied to him, to execute a release to Mrs. G. Lawrence Fisher and her unborn child, of his right in Lawrence's property. He refused, but said he would never trouble her or her child. Mrs. Diana F. was present, but neither advised nor dissuaded F. in the matter.

Cross-examined. Testator's conversation was in some degree pantomimic, and was much more intelligible after a person had become accustomed to it, than at first. He could not utter distinctly a continuous sentence if it were long, but could utter it intelligibly to those accustomed to his conversation. He could

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utter a short sentence, as "It is fine weather," "I have been riding out," and the like. In a long sentence, witness could not have understood him without observing the motion of his lips, his gestures, and the expression of his countenance. Thought G. L. Fisher was partially deranged in intellects before his marriage, and his derangement was generally very apparent. He was always so far deranged while witness knew him, as to be incapable of executing a will. Mrs. Diana F. was always on very friendly terms with Mrs. G. L. Fisher.

MARGARET ROSE, for the defendants. Lived in Mr. F.'s family four years, till her marriage just before his sickness, and saw him frequently till his death. On the 14th of July, 1824, rented a house and lot of him for ten years, at the rent of \$80. The lease was to her husband. She made the bargain for the lease with F. personally. Went to see him several times about it, and tried hard to get it for fifteen years at \$70 rent. The rent of \$80, was the full value and a little more. Saw the testator sign the lease; (which was produced to the witness.) Mrs. Hawksworth wrote the body of it. Neither she or Diana gave any advice to F., or interfered in the transaction. Was present at Mr. F.'s marriage with Diana. He stood up a little while at the commencement of the ceremony; before it was over, he said he was tired, and asked the minister if it would be proper for him to sit down, and on being told it would, he sat down. Witness never heard F. say, nor saw him do, any thing that induced her to suspect his mind was not sound. Always thought he was in sound and perfect mind. He could not speak very plain, but she could make out to understand what he said, and he understood what she said to him.

Cross-examined. Very seldom conversed with testator, except about the lease, and he very seldom said any thing to her. Never saw him alone during his illness. Saw no difference in his mind after his sickness, and he was fully as capable of transacting business as before, and so continued until his death. She considered the marriage of the testator at the time, as a reasonable and rational act.

ALEXANDER BIRKBECK, for the defendants. In June and July, 1824, took leases from the testator for two lots of ground

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in Brooklyn. Applied to him first for one lot. He inquired what witness wanted of it. Witness told him, to build an iron foundry on, and he wanted a lease for twenty-one years. F. objected to give a lease for so long a time. His speech was difficult for witness to understand, and Mrs. Hawksworth, who was present, often interpreted what he said; she appearing to understand him better than witness, who then addressed himself to her, she repeated to testator and received his answer, and repeated it to witness. In this manner the bargain between him and witness was concluded. He refused to give a lease for more than twelve years, or to pay for improvements put on the premises. He asked \$50 for the rent, which was a fair rent, and witness agreed to give it. Mrs. H. took no part, except to repeat what was said. A lease was afterwards executed. Testator himself signed it. In June, 1824, witness applied to him for another lot, adjoining the former, and obtained a lease, which was signed by the testator, though witness did not see him sign it. Has paid the rent five or six times, first to Mrs. H. in testator's presence, and latterly to Mrs. Fisher, when he was not present. Each signed the receipts with her own name, for the testator. In the negotiation he appeared as competent to make a bargain, and to understand it as well as witness himself, and witness thought he was competent to do business, and his mind was sound.

GEORGE SCOTT, for the defendants. Was married May 2, 1827, at testator's house, and slept there that night. Next morning first saw him. Was introduced as the person who had married Miss Denyse, upon which he wished witness a great deal of joy. His speech was broken, but witness understood him plain enough.

RIME SCOTT, for the defendants. Was married to the last witness as before stated. She knew F. eight years, and was frequently at his house. The day before her marriage she told him it was intended, and asked if she might stay there two or three days. He said yes, and he hoped she might do well. In the evening, when dressed to be married, she went into his room; he called her towards his bed and told her she looked very nice. Next day he wished her a great deal of joy. Cross examined.

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Never had any suspicion that the testator's mind was unsound, nor heard any one say it was.

CATHARINE BOWLES, for the defendants. With her sister Ann sold lands to the testator at three different times. The first sale was about September, 1824, the next the year after, and the third the year after. Cannot specify the times precisely. The bargain for these lands was made by witness and her sister with the testator; no person for him, taking part in the conversations. The first sale there was but little conversation; he wanted a less price, but soon acceded to what they asked. The next year, he would not accede to their price, and they talked about it several different days, but finally he gave their price, and asked the refusal of their remaining lands in the same vicinity. On the third occasion, they called to see him, about the end of last winter, (1827.) Soon after they came in, he asked if they had sold their remaining lands, and said he would buy them if they had not. There was some conversation as to the price, and soon after but not on that day, a bargain for those lands was concluded. On all these occasions, the testator appeared to understand himself perfectly, and to be entirely competent to the making of the bargain. He gave them no more than the fair value of the lands. Cross examined. The lands were in Rapelye's patent in Delaware county. Testator said he had been through that county, but had not seen these lands. Would take her word as to the quality of the lots, and the information which she stated she had from persons near them. He said he did not get much interest for his money, and he might as well have the lands, and he intended to keep them. He also said he had no land in that patent, and would like the lot because his wife's father's name was mentioned in the patent. Mrs. F. was present, but said very little. They gave him the refusal of the third lot, when he bought the second. There were four or five hundred acres in the whole. Cannot now tell the price she got, nor within \$300, or \$400, of the price. Was offered two dollars an acre for them several years before, by a person who lived on the lands. Did not then wish to sell. Mr. J. Dean was present each time when the deeds were executed. One lot belonged to witness, one to

her sister, and one to them both. She refers to the sale of all three.

ANN BOWLES, for the defendants. Knew testator by sight, eight or ten years prior to December, 1824, and after that visited him occasionally till May, 1827. Thinks the sales mentioned by her sister, were the first in December, 1824, one the next summer, and the last in the summer of 1826. (In other respects, her direct testimony was in substance like her sister's.)

Cross examined. The price of the first lot sold was \$1 50 per acre. Testator inquired if all taxes and quit rents had been paid up. Was informed they had been, and the receipts were produced. Witness and her sister did not go with a view of selling these lands, and did not think of selling them. He had the map and field book of the lands to look at, and inquired as to the quality. It was a map rolled, not folded, and was taken to his house at his request, after the first and before the second purchase. The second sale was talked about at three interviews. Thinks they took a less price on that, than they at first asked. It was more than they took for the first lot. The third lot was sold for a higher price than the second; thinks it was \$2½ or \$3, per acre. Visited him last in May, 1827. He had an impediment in his speech, but she could understand distinctly each word he spoke. Did not hear him prompted, or hear any one assist to explain his meaning. He did not speak as distinctly at some times, as he did at others. Mrs. F. in no instance took any part in the bargains for the lands.

FREDERICK C. SHAEFFER, for the defendants. Is pastor of the Lutheran church of St. James, in the city of New York. Knew G. Lawrence Fisher seven or eight years. He was of sound mind when witness first knew him; afterwards became insane, and was sent to the Bloomingdale Asylum. Previous to October, 1824, saw him out of the Asylum, and believes his sound mind was restored. He had been discharged cured, about six months before. He called on witness in October, 1824, to go over to Brooklyn and marry his brother John Fisher. Lawrence F.'s mind was then sound, as witness judged after talking with him. On the ensuing Sunday, witness went with him to testator's house, where witness was introduced to testator and to Di-

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ana Rapelye. It was late in the afternoon. G. L. Fisher and Miss R. stated that testator was infirm, had been sitting up long, and was fatigued, and requested that he might be permitted to sit during the ceremony, to which witness assented. Being told this and perceiving he was infirm, witness conversed with him, before proceeding with the ceremony, with a view to ascertain whether the state of his mind was such as to satisfy witness he was doing his duty as a christian minister in marrying him ; and the result was a conviction that the testator was of sound mind. Does not remember the particulars of the conversation, which was short. Witness then married them in the presence of G. L. Fisher, Mr. and Mrs. Rose, and some others. Never saw the testator, except at that time. The Fisher's were Germans by birth, and Lawrence conversed with witness in German. For many years, witness preached in the German language.

Cross examined. Did not see the testator rise or stand while he was in the room. He appeared to unite in the request that he might sit during the marriage ceremony. Is confident this request was before the ceremony. The answer of witness was addressed to testator. After the ceremony, wine was handed round, and a glass of wine was handed to the testator which he drank ; his hand trembled, and his wife assisted him in holding it. On wishing him all joy and happiness, he thanked witness with an appearance of emotion ; and when witness promised to call again, he appeared much gratified.

MARIA KNIGHT, for the defendants. Knew F. from 1821, till his death. Was a visitor at his house at his first wife's request, for about a year, till just after her death ; and afterwards was at the house frequently, and conversed with him. Lived there while Lowther was there. Could always understand testator when he spoke, and during all the time, never suspected he was of unsound mind, nor heard any one say that he was. On seeing him after she got married, he said to her, " So Maria, you are married ;" and asked whom she had married, and what was his trade, and on being informed, said he was happy she had done so well. This was the last time she ever saw him. She was married in August, 1825. Lowther was a very steady man. Never heard any thing against his character. He was some-

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times away, when he ought to have been there. After the first Mrs. F.'s death, witness purchased mourning for the family by F.'s direction, who told her to go to Vanderveer's and get what was wanted. Mrs. Hawksworth was present and no one else.

Cross examined. He directed her to buy bombazine for mourning for herself, Miss Denyse, Miss Ryder, Lowther's wife, Diana R. and Mrs. H. Witness also bought scarfs, muslin, gloves &c., for the funeral. He desired to see the articles, and she showed them to him. He said they were none too good for his wife, and if he could do more for her he would. Did not perceive that his faculties were impaired by his sickness; he trembled and shook. Never perceived during all his sickness, but that he could converse as freely and as rationally on all subjects as he could before. He pronounced so that witness and all could understand him. Never heard Mrs. F. repeat or attempt to explain to any one what he said. He was as capable of transacting business, in respect of his mind, as he was previous. Judges from his conversing with her on a variety of family affairs. He complained of a soreness of mouth, which injured his speech. From what she saw, his mind was not in the least degree impaired.

WILLIAM H. ELTING, for the complainants. Rapelye's patent is in the lower part of Delaware county. Does not know as to the quality of lands in it. Lived many years in that county, and has been in the south part of it, which is generally rough and very mountainous. Would not give over fifty cents an acre for mountain lots which do not come down to the Delaware river. At a sheriff's sale, under instructions to bid two thirds of the value, witness bid off lands in that part of the county, for from fifty cents to a dollar and fifty cents per acre, and some as high as two dollars, he believes. The latter were nearer the river and had some timber.

E. H. Owen, and *W. Silliman*, for the complainants, submitted the following points.

I. The testator was wholly incompetent to make a valid will after his apoplectic fit, which terminated in paralysis, in the year 1824. (*Clarke v. Fisher*, 1 Paige, 171.)

II. Being so incompetent at that time, and his affliction con.

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tinuing down to the time of his death, it is incumbent on the defendants, to show affirmatively his competency to make a valid will at the time of its execution. (*White v. Wilson*, 13 Vesey, 87; *Peaslee v. Rollins*, 3 Metc. 164; Best on Presumptive Evidence, 186.)

III. This the defendants have failed to do; but on the contrary, the weight of testimony clearly shows his utter incompetency to make a valid disposition of his estate at that time.

IV. The testator was induced to make and publish the will in question, by fraud and undue influence imposed upon and exercised over him, during his last sickness, by his widow and others who were about him; and the same therefore, not being his will, is void. (1 Paige, 176; 1 Story's Eq. Jur. §. 234; *Whelan v. Whelan*, 3 Cowen, 537; *Blatchford v. Christie*, 1 Knapp, 73.)

V. The will in question, is void for uncertainty and repugnancy in its parts.

VI. But should it be adjudged valid, then by its true construction and interpretation, the devise in fee to the widow is void, being revoked by the subsequent valid devise in fee simple of the same estate to Magdalen Cornelia Fisher, and the heirs of Maria Clarke, Eleanor Clarke, Ann Smyth and Isaac Rapelye. (2 Paige, 122; 12 Wend. 602; 5 Ves. 247; 2 Plowd. 541; Lovell on Wills, 293.)

VII. Such subsequent devise to Magdalen and the heirs of the persons above named, is executory, and will not take effect until the death of the widow, so that, the devise to the widow being void, the rents and profits during the life time of the widow remain undisposed of by the will, and therefore descend to Maria and Eleanor, as the only heirs at law of the testator, subject to the widow's right of dower, or thirds, therein.

VIII. But if the devise to the widow was not absolutely revoked, by such subsequent devise, still, it did not give her an estate in fee, but only a life estate determinable at her death; and the other devisees, Magdalen excepted, took a contingent remainder in fee in the same estate—so that if the said widow should die before such devisees, such contingent remainder, by reason of there being no person in *esse*, in whom it could vest, upon the termination of the particular estate, would fail, and the estate

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would thereupon descend to Maria and Eleanor, as his heirs at law.

Mr. *Silliman* cited in addition, on the necessity of instructions, &c., *Billinghurst v. Vickars*, 1 *Phillimore*, 187; *Evans v. Knight*, 1 *Addams*, 229; *Brogden v. Brown*, 2 *ibid.* 441; *Bridges v. King*, 1 *Hagg. Consist. R.* 256; *Marsh v. Tyrrell*, 2 *ibid.* 84; *Ingram v. Wyatt*, 1 *ibid.* 384, and 3 *ibid.* 466; *McKenzie v. Handyside*, 2 *ibid.* 211.)

D. S. Jones, for the defendants, Sawyer and others, made the following points :

I. John Fisher, the testator, was of competent mind to make a will, at the time of making the will in question in this cause. The chancellor's decision as to the personal estate has no controlling influence here. (*Denton v. Jackson*, 2 *J. C. R.* 320; *S. C.* mentioned in the digest, 7 *J. C. R.* 254; *North Hempstead v. Hempstead*, *Hopk. R.* 288; and affirmed in 2 *Wend.* 109; *Bogardus v. Clarke*, 1 *Edw. Ch. R.* 266.)

II. The will was not procured by fraud, imposition, or undue influence; but was the voluntary and unbiassed act of the testator.

III. 1. By virtue of this will, Diana Fisher, the widow of the testator, now Diana Sawyer, the wife of the defendant Lemuel Sawyer, became entitled to all the estate of which the testator died seised or possessed, in fee and absolutely. Or, 2. She became entitled to the house and lot on the corner of Front and Dock streets, in the village of Brooklyn, mentioned in the said will, in fee; to one-half of the residue of the estate of which the said testator died seised or possessed, in fee and absolutely; and to an estate for her natural life, in the other half of the said residue of the said estate. Or, 3. She became entitled to one-half of the estate of which the testator died seised or possessed, in fee and absolutely, and to an estate for her natural life in the other half of the said estate. Or, 4. She became entitled to an estate for her natural life in the estate of which the testator died seised or possessed. (1 *Jarman on Wills*, 411, 417.)

That Lemuel Sawyer, by virtue of his marriage with the said Diana, became entitled to an estate in all the estate to which the

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said Diana became entitled as above mentioned, to hold the same during the natural life of the said Diana, with remainder after his death to the said Diana and her heirs.

W. Curtis Noyes, for Magdalena Cornelia Fisher.

THE ASSISTANT VICE-CHANCELLOR—When the will of John Fisher was before the chancellor, he decided that as a will of personal property, it was invalid, and reversed the order of the surrogate admitting it to probate. His decision was upon the ground of the imbecility of the decedent's mind, and the undue influence to which he was subjected; at the same time avowing his opinion that either ground was sufficient to invalidate the will. (*Clarke v. Fisher*, 1 Paige, 171.) The question is now presented upon its validity as a will of real estate, and it is well settled, (although it is to be hoped that as the reason for the anomaly has essentially ceased, the rule itself will be changed;) that the chancellor's decree is not decisive or even controlling upon the point now raised. The case of *Bogardus v. Clarke*, (1 Edw. Ch. R. 266,) exhibits the rule and its reason, in reference to this identical will.

Being thus deprived of the relief which the decision of my learned superior should have afforded, I was induced on my first consideration of the case, to direct an issue. But I found that there were serious difficulties, the fault of the great delay of the parties on both sides unquestionably, but nevertheless such as I am not at liberty to disregard. More than eighteen years have elapsed since the testimony was taken. Some of the witnesses I know, and I presume many others, are dead. The events are of nineteen or twenty years standing. Few of the benefits of an oral and personal examination of the witnesses could be obtained upon the trial of an issue under such circumstances; and probably neither party would regard it otherwise than as an infliction of unnecessary trouble, expense and delay. I therefore feel it to be my duty, to dispose of the case upon the evidence before me; and I have seldom encountered a duty that in all its aspects, has been so unpleasant.

Before proceeding to the main question, I will premise, that

the complainants have not brought the necessary parties before the court to have a construction of the will, in case it shall be held valid. And in my remarks upon its character, I shall not go beyond the probable intent of the decedent apparent upon its face; leaving out of view the inquiry whether the will legally effectuates such intent.

First. In regard to the decedent's capacity to make a will.

This inquiry led to a minute investigation of his health, and the history of his life from the first of May, 1823, until his death on the 29th of June, 1827.

Prior to May, 1823, the decedent had enjoyed good health and all the testimony concurs in representing him to have been a man of unusually strong and vigorous intellect, and of uncommon argumentative powers. He was at that time living with his first wife, but was childless, his only son having died before attaining to manhood, many years before. His blood relations were a brother, George L. Fisher, then unmarried, and two nieces, the daughters of another brother who had been dead ever since 1787. Both of these nieces had been married a long time, and had families of children. One of them resided in Brooklyn, and the other in Western New York. There does not appear to have been any intimacy or correspondence between the decedent and the latter family, nor much intimacy with the family of the other niece, who resided in Brooklyn. He was not in the habit of visiting there often, but this niece, Mrs. J. R. Clarke, visited his house, and in the early part of his sickness, was a constant visitor there. The decedent's wife had sisters and a brother living in the vicinity, but no intimacy between them and the decedent is shown.

At the period of his illness, he was sixty-six or sixty-seven years of age.

I will mention some of the dates which become important in the inquiry. The attack of apoplexy was on the 3d day of May, 1823. His first wife, Cornelia Rapelye, died on the 4th of March, 1824. The decedent married Diana Rapelye, the sister of his first wife, on the 31st of October, 1824. The will in question, was made on the 2d of May, 1827, and he died on the 29th of June following.

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The bill alleges that the stroke of apoplexy deprived the decedent of his speech and the use of his limbs; almost destroyed his mental faculties, and rendered him totally incapable of thought. That the apoplexy gradually terminated in palsy under which he permanently continued, and by which he remained deranged in mind, and entirely incapable of transacting any business whatever. For one or two weeks succeeding his wife's death, his mental faculties appeared to be partially roused, so that he appeared to comprehend in some measure conversation which was addressed to him, and to answer it partly by signs, and partly by speech, but he continued entirely palsied and helpless in limbs and body. And except during that fortnight, the bill charges that there was no time between May 3, 1823, and his death, when the decedent was capable of comprehending and assenting to a will; and the complainants are not satisfactorily convinced of his capacity during the excepted period.

The bill was verified by the oath of James B. Clarke, who, if intestacy were established, was tenant by the curtesy of one-half of the real estate.

The answer of Diana Fisher, which is responsive to the bill, admits that the apoplexy terminated in palsy, and that the decedent continued enfeebled in his limbs and body till his death. She denies that he continued wholly helpless or unable to rise; or that he was imbecile, enfeebled or unsound in mind, after his partial recovery from his first attack; and she avers that the state of his mental faculties improved after the spring of 1824, and were stronger and more sound the last year of his life, than they were the fortnight succeeding his first wife's death.

There are some facts respecting the decedent's situation, which are so clearly established, that I need not refer to the particular testimony by which they are proved; and will proceed briefly to state them.

His attack of apoplexy was very severe. It paralyzed him and deprived him of his senses. Apoplexy always affects the brain, and one physician says his was particularly affected. The decedent however had so far recovered, that before Dr. Ball ceased his attendance, which was the latter part of July, 1823, he un-

derstood the doctor's questions, and his speech had become so far intelligible, that the doctor could understand some of his words. The palsy in which it terminated, was not decided *hemiplegia*. The hands and feet were affected, and one side somewhat more than the other.

In the early period of his illness he could not feed himself, but he could the last two or three years, and could use his hands, and draw up his feet. He spent most of his time in bed, but during those three years, he could and did set up for hours at a time, and could sit without assistance or support. He was also in the habit of riding out occasionally, and once in 1825 or 1826, (as it casually came out in the testimony,) he rode to Bloomingdale in New York, some six or seven miles, and remained there to dinner. He was helped into and out of the carriage on these occasions.

During the whole time, his articulation was considerably impaired, but those in the habit of conversing with him, readily understood what he said. At various periods, it was shown that he had a sore mouth or ulcerated tongue, which was probably in part the cause of his defective utterance.

To those who saw him but once, or unfrequently, his speech was understood with difficulty; and to some of those persons, he had the appearance of crying without cause, and of laughing and crying together. •

No person was appointed to manage his affairs, but he was left to direct the transaction of his business, to the close of his life. And during his life, no distinct allegation appears to have been made by any of his relatives or friends, that he was imbecile or unsound in mind.

A great part of the testimony adverse to the will, relates mainly, and much of it exclusively, to the attack of apoplexy, and the time immediately succeeding it. Such of it as is clearly brought to bear upon the time subsequent to Mrs. Cornelia Fisher's death, will be noticed more at large.

There is no *lunacy*, or habitual insanity, imputed in this case; and I do not understand that it is to be treated as a case of general derangement of mind, because it is shown that for two or three months, or even four or five months, the decedent was

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laboring under and recovering from an attack of apoplexy, and was suffering its necessary and usual concomitants, a deprivation of reason in the outset, and its gradual restoration. On the contrary, the recovery from its effects, so far as to survive four years and upwards, presumptively shows that the patient must have overcome its most violent and peculiar features. It is true, the mind is often left imbecile; but that is in cases of a lingering continuance of the disease; and I find no such instance stated by medical writers, where the patient survived four years without any intervening attack. The fact that palsy ensued, does not affect the point; for palsy is not shown to impair the mind, any more than the ordinary diseases which reduce the bodily strength.

I may err in my view of the subject, but I think that the delirium or imbecility of mind, or unconsciousness, which ensues from violent or acute diseases, is not to be regarded as establishing a general derangement of intellect, so as to throw the burthen of proving a sound mind, upon the party setting up a deed or will executed long after the force of the disease is spent, or it has terminated in one of a different character. Without stating the cases at large, I refer to *Attorney General v. Parnter*, (3 Bro. C. C. 441;) *White v. Wilson*, (13 Ves. 88, 89;) *Waters v. Howlett*, (3 Haggard, 790;) *Chambers v. The Queen's Proctor*, (2 Curteis, 415.) And see *In the goods of Field*, (3 Curteis, 752,) where the will of a paralytic, made when incapable of speech or of signing his name, was pronounced for, however it was not contested.

In this case, if the complainants are driven to prove mental imbecility in May, 1827, without the aid of the presumption of general derangement of mind continuing from 1823; they must fail beyond a doubt. With the weight of the answer, and of all the positive testimony of the decedent's acts in 1825, 1826, and 1827; there is no sufficient testimony on the other side, within those years, that is at all adequate to compete.

Assuming however, that it is incumbent on the defendants to show the decedent's restoration to the use of his mental faculties; how stands the case?

Much of the testimony, as is usual in these cases, consists of

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opinions of witnesses. The opinions of physicians are proper evidence. The opinions of others, are to be weighed by the facts on which they are based ; and the facts are therefore more important than the opinions. (See *Evans v. Knight*, 1 Addams, 229, per Sir John Nicholl.) As to the physicians, Dr. Ball, who attended him in his first attack, for several weeks, thinks he prescribed for him once in February, 1824 ; but he did not visit him at all after March, 1824. He perceived no change for the better after July, 1823 ; yet the bill founds an important allegation on a change early in March, 1824, and every witness who saw him frequently, speaks of a decided and marked improvement after the summer of 1823.

Dr. Wendell visited him as a physician during the first month of his apoplexy, and saw him again but without conversing with him, during Mrs. Cornelia Fisher's last illness in February, 1824. His opportunity of judging, after the first attack, was too limited to enable him to give a reliable opinion. His testimony as to apoplexy, goes far to do away with the idea of a general derangement of intellect, being applicable to this case.

Dr. Rowland's testimony is more important, for it relates to April, 1827, just before this will was executed. He thought the decedent's mind was very weak, and that he was not capable of making a contract. Dr. R. did not converse with him, or hear him say any thing from which this opinion was formed. But it was from his laughing and crying, the appearance of his countenance, and his doing nothing except through his wife, and assenting to all she proposed and said. Yet this witness did not hesitate to enter into a written contract with the decedent, and one which it is evident would not have been made by either the witness, or by Diana Fisher, without the decedent's presence and sanction. The act in this instance, speaks louder than the opinion.

On the other hand, Dr. Cameron, who attended the decedent occasionally, and was his only physician, after the spring of 1824, did not perceive that his mind was diseased, and has no doubt that he was of sound mind. Dr. C.'s last visit was in April, 1827. His opinion is strongly corroborated by that of Dr. Watts, who saw the decedent once only, in July or August, 1826,

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Though Dr. W. had never conversed with him, he had no difficulty in understanding what he said. The conversation which he details, can scarcely be reconciled with mental imbecility. Few wills made during sickness, can ever have the support of as strong proof of sound and disposing mind and memory, as is afforded by this interview with Dr. Watts.

Upon the testimony of the experts therefore, the proof of capacity is strong. The two attending physicians in 1823, are restricted to the first attack. Dr. Rowland is much shaken by his own act, and the testimony of Drs. Watts and Cameron, prove abundant capacity in 1826, and the latter its continuance to the era of the will. In a case much weaker than this, upon the medical testimony, Sir John Nicholl disregarded the opinion of both the attending physicians. (*Evans v. Knight*, 1 Addams, 229.)

The other witnesses against the will, who did not see the decedent after Mrs. C. Fisher's death, I need not advert to in detail, in the view I am now taking, in which I am throwing the burthen on the defendants.

Two circumstances, which they in common with others, dwell upon, I will mention. The laughing and crying, or appearance of so doing, was in part natural, and is thus accounted for. The decedent was easily amused, and would laugh at a joke or interesting remark. And it was equally natural that he should shed tears, when meeting or parting with an old companion, associate, or friend; for he could not help being deeply moved by his situation, and its contrast with his former active and energetic life. The laughing and crying in the same breath, was doubtless, the nervous affection of the muscles of the face, or *hysteria*, which is described by the physicians. That this is the explanation, is proved by the fact that those who saw the decedent daily or frequently, and were accustomed to the appearance of his face, discovered nothing of this simultaneous crying and laughing. The childishness, which is mentioned by some of the witnesses, is founded mainly upon this appearance of the face; and not upon what he said or did.

The other circumstance, the difficulty in conversation, was in part ideal, as proved by Dr. Watts and numerous other witnesses; and in part was owing to the defective power of articulation, from

causes before mentioned. This defect to one seldom seeing him, would appear to arise from want of mind, while it may have had nothing to do with his mental capacity.

Of the witnesses against the will, after the death of Mrs. C. Fisher, Mr. Sands saw him once just after her death; again in the fall of 1824, or winter of 1825; and for the last time, in the summer or fall of 1826, for about five minutes. He says he thought *the force* of the testator's mind was gone. This might well be, and leave enough mind to make a will. The witness says the testator could understand *little things*, as the incorporation or location of a bank, and matters generally which affected his interest. And he proves that the decedent did understand, when the witness called to surrender the lease for a tenant. But some new phase in politics, the decedent could not appreciate, (in 1823, 4;) and the witness thought he could not form just conclusions in any thing complicated.

Now there are three facts in this testimony, which with what I have already stated, go far to sustain the decedent's capacity by this witness. In the spring of 1824, the witness was present and aiding in the execution of the decedent's will. In the fall or winter ensuing, he called on the decedent to negotiate and effect the surrender of a lease; and in the summer of 1826, he as the keeper of that will, at the request of the decedent, restored it to him, obviously to be cancelled. (See Sir Herbert Jenner Fust's remarks on similar acts, in *Wrench v. Murray*, 3 Curteis, 623.)

Mr. Spooner, another intelligent witness, was decidedly of the opinion that the decedent had not sufficient mind to transact business. He states the fact that Mrs. Fisher did the talking, and received payments made by him, and he could not understand what the decedent attempted to say. His last interview was in February, or March, 1827, and though Mr. Spooner, and Mr. Wright who was present and who never saw decedent after his first attack, except on that occasion, could not understand his words; both could perceive that he gave the direction to the donation; and his giving it to the poor of Brooklyn, instead of the Greeks, did not argue any absence of sound judgment. Mr. Spooner also was not unwilling to pay his bond and mortgage in decedent's

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presence ; though it may be he imagined that the wife of an imbecile had authority to transact all his business.

Thomas Lawrence, (whose deposition I think is admissible, as taken down by the surrogate, although not signed,) did not see much of the decedent, after his first wife's death. He founds his opinion on the decedent's appearance, and his inability to converse. Yet this witness thought he ought to make a will.

John F. Lawrence, saw the testator only two or three times, after he recovered from the severity of the first attack. The last occasion was in December, 1824, and then in the face of his declared opinion as to his competency, he received the decedent's check for more than \$100.

Mr. Nichols, who was over seventy-eight years of age, visited the decedent five or six times, during the four years. He had no business with him, and did not converse with him, because the witness thought it useless. He inferred unsoundness of mind, from the decedent's holding on to his hand a long time, when he came in, and laughing and crying in the same breath. Mr. Nichols had been very intimate with him in former years.

The opinion of Elizabeth Denyse, who did not see him after 1825, and who speaks to no tangible fact in regard to his capacity, is too extravagant to require any notice.

Mr. F. Hopkins, saw the decedent only about five times, and except once, was with him not more than a minute at a time. This did not enable him to form any opinion, and he relates no material fact.

H. W. Cady saw the decedent but once, in December, 1826 ; and then thought he was not in his right mind, because the witness could not understand what he said.

Mrs. Park formed no opinion as to his mind, but was at the decedent's house the day the will was made, and Mrs. Fisher said he was too low for any one to speak to him. This was not inconsistent with sufficient capacity. The decedent had been unusually tasked on that day, both in mind and body, and it was quite of course that he should be depressed, after the excitement of the occasion was at an end.

Of Messrs. Titus, Stillwell, and S. James, it is sufficient to

say, that their opportunities were not such as to enable them to aid the judgment of the court.

Some other witnesses who were much relied upon, do not come within the period after Mrs. C. Fisher's death. Thus Bishop H. U. Onderdonk, (who says that his recollection as to dates and times is very imperfect,) I am satisfied, did not see the decedent after March, 1824, except on his New Year's call on the 1st of January, 1825.

Gen. Bogardus saw the decedent while laboring under his apoplectic attack, and the conversations he relates, were in the summer of 1823. I think he did not see the decedent after the fall of that year. Mr. Bogardus did not scruple, even in that, the worst stage of his disease, to obtain the decedent's checks for \$250 and \$500.

Mr. Vandenhoeft visited the decedent with Dr. Ball, and this fact carries his testimony back to the winter of 1824.

Mr. Tredwell never visited the decedent after the death of Mrs. C. Fisher, and it is doubtful if he saw him after the fall of 1823.

One witness remains, upon whose testimony great reliance was placed; the male nurse, Lowther. He was with the decedent from the last of May, 1823, till the first of May, 1824; and saw him twice or three times subsequently, the last occasion being in November, 1824. His testimony is not very marked as to the decedent's mental capacity, and it is more pointed upon the question of undue influence. But I may as well state here my impressions of it, upon a careful and repeated perusal. He obviously testifies with a feeling or prejudice against the defendant; the cause of which appears in his being dismissed from service. The dismissal was clearly unexpected, at the time it occurred, for he had just brought his wife there, and they were occupying the front basement. This feeling of ill will, has led him to testify quite loosely. Thus, he says he did not see the testator grow better or worse, during the eleven months he remained there, nor did he perceive any difference in his speech; and his mind was no better after his first wife's death, than it had been in the previous part of his illness. Now contrast this with the proof on all hands, that when this witness first took

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charge of the decedent, he was in the first stage of recovery from a violent apoplexy, helpless and incapable of speech, and his mental faculties just emerging from a total eclipse; and the equally conclusive proof from the complainant's own witnesses, that before Lowther left, the decedent could converse intelligibly with those accustomed to him, was able to sit up and ride out, and was consulted in respect of his business affairs; contrast it with Lowther's own statement of what the decedent said and did; and it goes far to destroy confidence in his testimony. The deposition, though unfortunately, not taken down by question and answer, shows how the witness was led, by the examining counsel. His first assertion as to the decedent's capacity, was that "testator's mind was pretty weak." His specification in support of this is, that the decedent could understand the witness, but could not understand all subjects, or if he did, he did not let it be known. The latter was certainly probable, for it is not to be supposed that a man of the decedent's intelligence and standing, would be very familiar on abstruse or general topics with his nurse, unless he had really become childish; or that he would converse with Robert Lowther as he would with Dr. Watts or Judge Furman.

To pursue the witness's course of testifying, his next point is, that the decedent was childish, and would cry and laugh almost in one breath, when people came in. I have said all that is necessary, upon this crying and laughing. The childishness is to be determined by his sayings and doings. Next, the witness says the testator did not transact any business. This was a sweeping statement, and he is made to qualify it forthwith; and finally, his deposition shows no instance of a purchase being made of any kind, without the decedent's being consulted, except the single occasion of the goods procured for mourning, on Mrs. Fisher's death, and he found fault with that, and was angry about it. He testifies that when Mrs. Hawsworth asked him how he thought it would do for the testator to marry Diana, he replied it would not do at all, it was against the gospel for a man to marry his wife's sister. No ground of mental incapacity, or even of personal impotence, then occurred to him. After a considerable interval, he was brought to this point again, and he

says "in his opinion testator was not in a fit situation to be married, no more than a dead man, for he could not move himself in bed without help." He adds, that he saw no other reason, than that he was so helpless. This answer negatived mental imbecility, and the witness was pressed again, and then he says to the best of his opinion, testator's mind was as unfit as his body. To recur to the prior answer, as to the decedent's inability to move in bed, (and this was after Mrs. C. Fisher's death,) the witness had only a short time before, in exhibiting the indecency of Mrs. Hawksworth and the first Mrs. Fisher, represented the testator as repeatedly *kicking off* his bed clothes, and persisting in so doing, *in the summer of 1823*, while suffering under his first attack. The witness however corrected himself, so far as to say that the decedent could use only one leg at a time. The witness stated that Mrs. Hawksworth *and Miss Rapelye*, (the defendant, Diana,) lived with the testator while he was there, and controlled and managed his affairs. By and by, he testified that Diana did not come there till the fall or winter before her sister's death, and he made out that while she lived, the first Mrs. Fisher managed, and after her death, Mrs. Hawksworth.

So in regard to his own dismissal, he saw a plot of which he was the victim. He says he saw that Mrs. H. and Diana, were working a plan that he "should not be there to hear their conversations *or actions*." Yet when the facts are drawn out about his leaving, it seems that the decedent complained of his not getting up earlier in the morning, Diana said he got too much wages, as to which the decedent said nothing, and *Mrs. H. made no complaint at all, but thought the witness ought to stay.*

Surely, a witness who thus exhibits himself upon the stand, is not entitled to much weight, in deciding grave and important questions of property.

I have now gone through with the testimony against the will, at the same time presenting in connection, all the testimony of the physicians on both sides. I am now considering the case, on the footing that a general derangement of intellect in 1823, has been shown, and that it is incumbent on those sustaining the will, to show the restoration of sufficient testamentary capacity.

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In this view, the testimony for the complainants, is certainly corroboratory of the continuing mental imbecility, to a great extent.

I will next look at the other side of the case, omitting as in the foregoing, all special reference to the time antecedent to the first Mrs. Fisher's death.

First in order, is the answer of Diana Fisher, entitled to the weight of two witnesses, speaking directly to the point. Next is the testimony of Dr. Watts and Dr. Cameron, which I have sufficiently stated.

After these, a great number of witnesses testify to various conversations, and acts of the decedent, showing mental capacity. Sarah Ann Ryder, lived in his family four years, down to November, 1824, and saw him occasionally till the summer of 1826. While an inmate of his house, she saw him daily. Her opinion, like that of Lowther's, is of itself unimportant, but she testifies to several facts, which indicate sufficient mental capacity in the decedent. And she proves also, the real cause of Lowther's dismissal, viz. frequent and long absences, and a disobliging angry temper.

I ought perhaps in justice to myself, to go through with a minute examination of this testimony, but it would swell beyond endurance, a judgment which is likely to be tedious at best.

Of these witnesses, there are several who were in the habit of seeing the decedent daily, and at various hours of the day, during considerable periods of the last two or three years of his life; two at least, who resided under the same roof, for more than a year next preceding his death; two others who resided in the house for several months, in the year 1826; and one who was there for two or three weeks after this will was made. These witnesses, with the best opportunities of knowing and observing any act disclosing mental imbecility, all concur in proving him to have been of sound mind.

And I may here remark, that if this decedent after February, 1824, were really such a mere intellectual wreck, as he was represented by the complainant's counsel, it is very surprising that during the three years preceding his death, not a single act or expression of his has been brought forward, which sustains the charge. On the contrary, there are many acts proved, which

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are to my mind, utterly at war with the position that he was, or that his relatives deemed him to be, of unsound mind.

I have alluded to their omission to interfere by obtaining the appointment of a committee of his large estate. It does not meet this point, to say that no disposition which he could make, would be valid, because he was *non compos mentis*. He had a large personal estate, and valuable stocks. What was to prevent him, or the persons about him, from wasting and making away with the whole of them? If reference be made to the will of March, 1824; that was given up by Mr. Sands to be cancelled in 1826, and from his position with these parties, when the will was made, I cannot doubt but that the decedent's relatives were at once apprised of its being cancelled.

But the acts of Mr. James B. Clarke, which are pertinent in respect of his relationship, and his being a party in the outset of the suit, are of themselves almost conclusive of the decedent's capacity.

In March, 1824, he was present, aiding and active, in having the decedent execute a will; and there is no doubt whatever, that the latter was more-competent after that period, than he then was. In the winter of 1827, Mr. Clarke procured Mr. Dean, then a commissioner of deeds, to go to the decedent's, and have him obtain the execution and acknowledgment of two deeds by the decedent and his wife. (Mr. Dean's account of that interview, I ought to mention, is strong proof of the decedent's soundness of mind.) The answer proves the execution of similar deeds by the decedent, the day before his death; but that part of the answer which states that they came from Mr. Clarke, is not responsive to the bill.

It would not affect the force of this testimony, if it had been proved that the deeds in 1827, were executed pursuant to previous contracts, but it is not proved.

When the court finds Mr. J. B. Clarke, a lawyer, and a man of business, (the leading party also in contesting this will,) dealing with the decedent in 1824, and again in 1827, as a man capable of making a will and executing conveyances; how can it say in his behalf, that the decedent was not competent? Various other instances are proved, in which the decedent transacted busi-

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ness without any difficulty, and with good judgment. As, the hiring of the office to the Brooklyn Insurance Company in 1824; the lease for ten years to the husband of Mrs. Rose, formerly his domestic, executed in July, 1824.

So of the leases to Mr. Birkbeck in the summer of 1824, for twelve years; and I might refer particularly to Mr. Birkbeck's account of this transaction. In all these instances, the decedent negotiated the terms, and signed the leases, as he did the deeds in 1827.

He made three distinct purchases of land, of the Misses Bowles, in or about 1824, 1825, and 1826. And in short, so far as I can discover, he transacted all his matters of business, with as much capacity, and as much of his personal intervention and direction, for the last three years of his life, as any man could do, however vigorous and undimmed his intellect, who was confined to his room all the time, and a part of each day to his bed.

I now come to the making of his will. For his general capacity on that day, we have the testimony of Rime Scott, as well as that of the three subscribing witnesses. And George Scott saw him the next morning.

Much stress was laid upon the manner in which Mr. Phelps obtained instructions for the draft of the will, and it is insisted that the decedent gave no instructions. Several authorities were cited, to show the necessity of instructions. In one of these, *Billinghurst v. Vickers*, (1 Phillimore, 187,) there were no instructions or directions whatever, yet the will was established as to all of it, except the addition in the hand writing of the executor and principal legatee. And it is only where the capacity is doubtful, that proof of instructions is ever required. In another of the cases, *Brogden v. Brown*, (2 Addams, 441,) the will was sustained without proof of instructions, although the capacity was questioned, the will not being "inofficious." It was said they might be presumed in that case. I was also referred to *Ingram v. Wyatt*, (1 Haggard, 384,) where the instructions came from the principal legatee, who was not a relative, and the testator's relatives were almost wholly excluded. I need not comment upon it, as it was reversed upon appeal. (3 Haggard, 466;) but the opinion of the judge in the prerogative court would sus-

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tain this case on the instructions proved. In *Barry v. Butlin*, (1 Curteis, 637,) the subject of instructions was ably discussed by Parke, Baron, delivering the opinion of the judicial committee of the privy council, and he limits it to cases where the person who draws the will, takes a benefit under it, and there are besides, circumstances of suspicion, greater or less, arising from the capacity of the deceased, the extent of the legacy given to such person, the amount of property disposed of, and the claims of other persons upon the testator. And in *Durling v. Parker*, (2 Curteis, 225,) Sir Herbert Jenner, not only approves Baron Parke's opinion, but declares that it has always been the doctrine of the prerogative court. And see *Wrench v. Murray*, (3 Curteis, 623.)

The instructions here, were obtained in the presence and hearing of the decedent. That he was able to hear, to understand, and to express his assent and his dissent, is not to be doubted; although Mr. Phelps, who was not accustomed to converse with him, could not understand all his words, beyond his assent and dissent. But each disposition was canvassed, before it was entered upon the solicitor's memorandum; the decedent himself named the banks in which he had stocks, and decided upon the two executors, excluding one suggested by his wife. During her absence from the room, Mr. Phelps repeated his inquiry in regard to the directions for her benefit. He proceeded with great care to obtain the decedent's views, and made minutes of the whole, and from those drew up the will in his presence. It was then read to him by Mr. Phelps, in the presence of Cornell, the decedent declared his approval, signed it himself, without aid, and acknowledged his signature. He was in his bed most of the time, but was sitting in his chair when he signed it, and continued sitting there unsupported for half an hour, and the witnesses left him in that situation. He appeared desirous to have his will drawn. The other two subscribing witnesses, confirm Mr. Phelps as to his capacity, and one of them says he was present when it was read before it was signed. Two or three witnesses saw the testator after the will was executed, and before his death, when he appeared to be of sound mind, and his bodily condition similar to what it had been previously; and Mrs. Jewett saw him sitting up

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in his chair, the day before he died, and he bowed to her as she passed by his door.

I must say, that there is no circumstance attending the execution of the will, which is calculated to make me doubt its being understood and intended by the decedent, or his capacity to make it.

If there be any thing incongruous in its terms, the fault is that of the solicitor who drew it up, rather than that of the decedent's instructions. It was said to be contradictory and repugnant, to such a degree that it is insensible and void. Confining myself to what I believe from the terms of the will, to have been intended by the decedent, I think he designed to leave all his property to his wife for life, and after her death to have the whole capital go to the persons named and described as residuary devisees and legatees.

If I am correct in this view of his intent, the will was "officious," in the language of Sir John Nicholl. Having no children, it was natural for him to give to his wife the use of the whole during her life. Of the remainder, five-eighths were left to his own blood relations, (assuming for this purpose that G. L. Fisher left a child,) and three eighths to his wife's relatives. The latter had no particular claims upon him, but on the other hand, the Clarke's were no nearer than nieces, and it is not improbable that the claims of their mother's estate, so zealously urged by Gen. Bogardus, in his early sickness, had soured the decedent's mind towards them.

It is to be observed, that a will is not to be set aside on as slight evidence of mental unsoundness, as would overturn a conveyance or contract, in which the consideration was very questionable, or the terms grossly unequal ; or a gift *inter vivos*, to a person who had no reason to expect it from the donor. Valid wills are made daily, by persons in the last stages of disease, when they are too feeble to sit up in bed, or to speak above a whisper, and when the mental powers must necessarily be much impaired. These circumstances are not considered as entitled to weight, unless the dispositions made by the testator are extravagant, or widely different from those which his situation and that of his family would lead a sensible man to expect. I refer for

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my views on this subject, to the judgment of Sir John Nicholl in *Ingram v. Wyatt*, (1 Haggard, 384,) and of Dr. Calvert, in *Middleton v. Forbes*, there stated.

In *Barry v. Butlin*, before cited, the will was prepared by the solicitor of the deceased, and he took a considerable benefit from it. The only son of the deceased was entirely excluded. The testator was of slender capacity, and indolent habits, of a retired disposition, addicted to drinking, somewhat singular in his appearance, frivolous and occasionally childish, in his occupations and amusements. He was an old man, and his son's conduct had estranged him. The court deemed him to be of testable capacity, though weak, and the privy council, affirming the prerogative court, sustained the will. In *Williams v. Goude*, (1 Haggard, 577,) the testator had an attack of apoplexy in June, 1819, from which he recovered so as to attend somewhat to business, for nearly three years afterwards, and was carried off by another attack in June, 1822. The will was executed ten days before his death, and after a life interest to his wife, it gave his entire property with a trifling exception, to his wife's nephews, excluding his sister's children; and on the circumstances, it was sustained. The case is instructive in respect of the extravagant opinions given by the witnesses against the testator's capacity; even his medical attendant saying he was in a state of absolute fatuity. The court nevertheless relied upon acts, rather than opinions.

Upon the whole, I find myself unable to doubt, but that John Fisher, when he made this will, was of sound, disposing mind, memory and understanding, sufficient to make a proper testamentary disposition of his property, and that the will was drawn up and executed in conformity to his intention.

The next ground urged by the complainants, is that the testator was induced to make and publish his will, by fraud and undue influence upon him, and exercised over him, in his last sickness.

This leads me to speak of his second marriage, which was the theme of much invective at the hearing. Besides the force of the answer, contradicting the allegations preliminary to the marriage, they have no support in the testimony, coming as they do

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from Lowther, six or eight months previous to its occurrence, and he being unworthy of credit. The answer proves that the parties cohabited, and Ryder proves that Diana slept with the testator after the marriage. On the day of the marriage, the testator sat up all day. His condition had been improving slowly, for nearly a year, and although a paralytic, and without any reasonable hope of entire recovery, he was not a bed-ridden idiot; or incapable of a just appreciation of his condition.

It is not very surprising that a man who had no children, no brothers or sisters, nor any near relatives by blood, who could or would devote their personal attention to his care and comfort, and who stood so much in need of constant care and assistance, as this testator did the last four years of his life, and who had an ample property at his disposal; should seek to secure such attention and assistance by a marriage. The marriage in question was suitable in point of age, and previous connection, and in the person and character of the wife, so far as this case discloses either. It was not a love-match, but it was the dictate of prudence and forethought on one side, and doubtless of interest on the other. Many marriages in early life, have no more worthy principle or motive than these. The marriage gave to Diana, a better claim upon the testator's bounty, but if the testimony pressed upon me is to be credited, it did not increase her power or control over the testator's mind or person.

The allegation of undue influence in this case, rests mainly upon the imbecility of the testator's mind, and as that is not shown to my satisfaction, there is not much to sustain the former. The strongest witness on this point, is Elizabeth Denyse, who it seems lost her place as the housekeeper of G. L. Fisher on his marriage, and she thought that marriage was a part of Diana's doings. She however testifies to nothing beyond Diana's desire to have a will executed.

In this connection, I will refer to the suppositious child of G. L. Fisher, and the stupendous fraud in that behalf, in which Diana Fisher is accused of participating. Taking the answer and testimony together, there is no proof that she knew or suspected that the child was not her brother-in-law's. And I am really at a loss to perceive how Diana Fisher was to be the

gainer by multiplying collateral heirs to her husband, and by such new, and from their tender years pressing, claims upon his bounty, interposing obstacles to a will in her own favor.

One other allegation remains to be noticed; the exclusion of Mrs. James B. Clarke from intercourse with her uncle. This rests wholly upon the testimony of Lowther, and he does not pretend that Diana Fisher ever treated Mrs. Clarke with any incivility or disrespect. If he had so testified, I could not safely rely upon his testimony.

As an entire refutation of the complainants evidence to prove undue influence and fraud, there is the answer of Mrs. Fisher, responsive to the bill. And I will add that in my view, the testimony sustains the answer.

The influence of affection or attachment, is not such an influence as will vitiate a will; or the mere desire of gratifying the wishes of one who is entitled to consideration and remembrance in the disposition of the testator's effects. It was urged that Mrs. Fisher attempted to conceal the fact that a will had been executed, thus exhibiting a consciousness that it would not bear the light. There is no proof of this. The conversation related by Mrs. Park, was with another person. And the three witnesses to its execution, prove no request or apparent design to have the fact concealed.

The authorities cited, do not sustain the complainants, as the case is presented by the pleadings and testimony.

In *Ex parte Fearon*, (5 Ves. 633,) there was clear evidence of undue practices, if not of positive fraud, to the exclusion of the testator's natural daughter, and contrary to his intention repeatedly avowed, and pressed only two days before his death, upon the party who obtained and set up the will.

In *Brydges v. King*, (1 Haggard, 256,) the deceased was in a state of extreme weakness and debility, the codicils then made were entirely at variance with her character, her affections, and her former testamentary dispositions. Her capacity was exceedingly doubtful, and the testimony of the witnesses about her person, in support of the codicils, was suspicious and contradictory.

In *Marsh v. Tyrrell*, (2 Haggard, 84,) the will was in favor

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of a husband who had married the testatrix, when an old maid and far advanced in life. It was entirely at variance with a prior will made after her marriage; and on these facts, and proof of strong means previously used by the husband to obtain the control of her property, her resistance while her health continued, and his contrivances in procuring the execution of the will and codicil propounded, just previous to her death, and while her capacity was doubtful; the court concluded that they were obtained by undue influence and marital authority.

In *Blatchford and wife v. Christian*, (1 Knapp's R. 73,) conveyances were set aside as being obtained by fraud and undue influence. The grantor was an old man, separated from all his relatives and connexions, and conveyed nearly all he possessed, to persons who were neither related or connected with him, in derogation of a previous revocable conveyance in favor of his niece. No previous draft of the deeds was made, or opportunity given to him to read, alter or correct them. One was dated in August, and the other in September, and before the close of the same year, the grantor was found by an inquest to be a lunatic.

In *Baker v. Batt*, (1 Curteis, 125, which though not cited, bears upon the point,) the will was obtained by a husband from his wife by fraudulent means, only two days before her death, after persevering efforts for two or three months. The testatrix had been ill several months, was about sixty years old, and had been married to the principal legatee, only about nine months when she died.

I ought to observe, in reference to *Marsh v. Tyrrell*, and *Baker v. Batt*, that the presumption of undue influence exercised by a husband over a feeble and dying wife, is far stronger than any that can be indulged, when a similar charge is made against a wife in respect of her deceased husband.

The case of *Whelan v. Whelan*, (3 Cowen, 537,) was one not merely of undue influence. The parties there practised a gross fraud upon their father, (who reposed unbounded confidence in them,) through his passions and his fears.

In my judgment, there is no fraud shown, nor any such undue influence, as ought to induce the court to set aside this devise.

I must be permitted to say, that I have come to this conclusion with great hesitation and reluctance, and not till after a most diligent examination of all the testimony in the cause. Not that I entertain any doubt in my own mind, but I cannot avoid perceiving, that even with the weight of the responsive answer of Mrs. Fisher in this case, (which was wanting on the probate of the will,) I must have differed in my view of the testimony, from the chancellor's estimation of it on the appeal from the surrogate. And I can never differ, even partially, from so profound, learned and experienced a judge, without feeling a painful distrust of the correctness of my own judgment.

It nevertheless devolves upon me to decide the cause, and in disposing of it to the best of my ability, I must decide in favor of the validity of the devise, so far as it respects its due and proper execution, and the testamentary capacity of Mr. Fisher.

If the complainants desire to have a construction of the devise in this suit, it may be accomplished by a supplemental bill, bringing in the necessary parties. The decree granting such leave, will declare the validity of the will, and reserve further directions.

If they prefer to leave the question of construction for another occasion, this bill must be dismissed with costs, as to the defendants who contested at the hearing.

The arrangement in regard to Magdalena Fisher, may be carried out in the decree.

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TEN EYCK & BRINCKERHOFF v. HOLMES and others.

WHERE a surety obtains from his principal a mortgage, to secure him against his liability, the creditor is entitled to the benefit of such security.

And if the surety include in such mortgage, a debt due to himself, as well as the indemnity against the principal's debt for which he is surety; as between himself or his voluntary assignees, and the creditor, the latter is entitled to be first paid, out of the proceeds of the mortgage.

As a *quasi* trustee for the creditor, in respect of the indemnity thus obtained; the surety is bound to pay over to him the first proceeds, in preference to paying them to any of his own general creditors.

Costs not given to either party, where the complainants succeeded in a part of their claims, and failed as to the residue.

Albany, January 15; March 16, 1846.

THE complainants held notes made by parties of the name of Wilber, on which the defendant Holmes, was an indorser and surety. They recovered a judgment against Holmes for the amount, January 16th, 1843, and on the 20th of February issued an execution. On the 30th of January, Holmes being liable for the complainant's debt, and having a demand of his own against the Wilber's to about \$857, obtained from them a bond and mortgage to himself, on lands in Steuben county, for \$1350, of which \$500 was inserted to secure him for his indorsement of the above notes, and \$850 for his own demand.

On the 18th of February, Holmes mortgaged his personal property, in part to the defendant Beaumont, and in part to the defendant Remsen, to secure debts due to, or liabilities incurred by them. On the 6th day of April, 1843, he executed to Beaumont and Remsen, an assignment of the Wilber's bond and mortgage, in trust for the benefit of creditors; and on the 18th of April, he made to them a general assignment of all his property and effects. The complainants recovered a judgment against the Wilber's on the 21st of February, 1843. Their executions on both judgments, were returned wholly unsatisfied. They then filed the bill in this cause, it being a creditor's bill as against Holmes and the Wilber's; and they set forth the foregoing transactions of Holmes, and claimed that they were entitled to priority

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of payment out of the proceeds of Wilber's bond and mortgage, to the extent of the \$500.

Beaumont and Remsen, by their answer, insisted that they were only liable to account to the complainants, for the surplus of the proceeds, after retaining the \$850, secured for Holmes's own demand.

The bill also alleged that the assignment itself was fraudulent, but it is not necessary to state the circumstances. The cause was heard on the pleadings and proofs.

C. Stevens, for the complainants.

D. Cady, for Beaumont and others.

THE ASSISTANT VICE-CHANCELLOR.—This case must be determined on the equities subsisting between the complainants and Holmes, when the mortgage from the Wilber's was executed to the latter. His subsequent voluntary assignment for the benefit of creditors, does not affect the question. .

Thus limited, the case is simple and plain. Holmes was standing in the situation of a surety for the payment of the Wilber's debt to the complainants, and he took from the Wilber's a mortgage in which the sum of \$500, was inserted for the express purpose of securing to himself the payment of that debt. The complainants, as the principal creditors, were in equity entitled to the benefit of that security. This principle was settled a century and a half ago, and for a recent instance of its application, I refer to *Curtis v. Tyler and Allen*, (9 Paige, 432.)

I do not perceive how this equity can be impaired by the circumstance that Holmes was a creditor of the Wilber's, and the mortgage was executed for the purpose of securing that indebtedness, as well as to indemnify him against the liability to the complainants.

As the debtor of the complainants, it was the duty of Holmes to discharge the liability, out of any means which he could make available for the purpose. In addition to this obligation, he became as it were, a trustee for them in respect of the mortgage, so far as it provided for discharging their demand against Wilber's.

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On receiving \$500, or any less sum, on the mortgage, Holmes would have been bound equitably to pay over the same to the complainants, in preference to paying it to any of his other creditors, by reason of this *quasi* fiduciary relation. And by assigning the whole mortgage, he conferred on his assignees no other or greater control over its proceeds, than he could have exercised himself.

The mortgage was for the absolute payment of the money to Holmes, and not merely to indemnify him against his indorsement. And the terms of payment, placing the \$500, first in order, leads to the inference that the parties actually had in view, the effect which the law attaches to the transaction, viz. the discharge of the complainants debt, out of the first moneys received on the mortgage.

Without reference however, to this indication of the actual intention, I think the complainants were entitled to the first receipts from the mortgage, to the extent of their debt and interest against the Wilber's, not exceeding however the \$500, with interest, included in the mortgage in respect of that debt.

And as the assignees knew of the nature of this provision in the mortgage, they would have been subjected to costs, for resisting the bill, were it not for the complainants attack upon the assignment itself. The bill having failed in that portion of it, neither party is entitled to costs against the other.

Holmes having assigned the mortgage without providing for the complainants equity, and joined in resisting it, is not entitled to costs.

OTTOMAN v. R. and W. T. MOAK.

A SURETY, on paying the debt of his principal, is entitled to the benefit of securities obtained by the creditor through a sale on a judgment for the same debt, recovered against the principal debtor.

An infant purchased goods and executed a mortgage thereon for the purchase money.—*Held*, after he became of full age, that he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount or deliver the goods, according to its tenor. If he disaffirmed the mortgage, he must restore the goods, or account for their value. He cannot affirm the sale and keep the goods, and at the same time repudiate the mortgage.

An assignment of a mortgage, carries with it all the incidents to its payment. Thus, in the instance of the infant's mortgage, it was held that an assignment carried the mortgagee's right to an account, and to the chattels mortgaged, as well as to an action for those converted; whether the infant affirmed, or disaffirmed the mortgage.

Albany, January 19; March 16, 1846.

REUBEN MOAK, a merchant in Schoharie county, became deeply indebted and insolvent, and his goods were levied upon and sold by virtue of an execution in favor of John Moak. Most of the goods were bid off by a son of the latter in his behalf, and were then sold without being removed, to William T. a son of Reuben Moak, who continued the business in the same store, with his father aiding him. To secure the price of the goods bought of John M., William T. executed to him a mortgage on the same goods, payable at a future day. At the time of the sale and the execution of the mortgage, William T. Moak was an infant, and he did not attain his full age, till after the proofs in this cause were closed.

David Ottman was a surety for Reuben Moak in the debt to John, and subsequently paid the same to the latter, and took an assignment of the mortgage. On the mortgage falling due and remaining unpaid, he took possession of such of the goods mortgaged as remained unsold, and sold the same; the proceeds amounting to about half the mortgage debt. He then filed the bill in this cause against Reuben and William T. Moak, claiming an account of the goods mortgaged which they had sold, and payment therefor. He also alleged fraud in the transaction by

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which W. T. M. became the purchaser ; and that he was a trustee for Ottman ; and some other matters. The cause was heard on the pleadings and proofs.

A. Dean, for the complainant.

Deod. Wright, for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—I do not think the alleged fraud upon the complainant, or the trust set up in the bill, is so clearly established against the answer of the defendants, as to warrant the court in making a decree on either ground specifically. Enough is apparent however, to exonerate the complainant from costs, if the case turned on these points alone.

In respect of the mortgage on the goods, W. T. Moak invokes the protection of the court, on the ground of his infancy when the contract was made. I think he is entitled to his election to affirm it or to disaffirm it ; and as he is now of full age, he may exercise the election either before the master, or by the service of a notice on the complainant's solicitor. But he is mistaken in supposing that his infancy would relieve him from this suit.

If he thought the mortgage were given for more than the goods were worth, it was incumbent on him to offer to restore the goods or account for their proceeds. And if he preferred to affirm the contract, he should have paid the mortgage.

There is no doubt of the complainant's right to the whole mortgage, and to all its incidents.

In the first instance, he was a surety for John Moak, as to the indebtedness of Reuben Moak upon which John was the first indorser, and therefore John's judgment, execution and sale against Reuben, enured in equity to his benefit. (See *Curtis v. Tyler*, 9 Paige, 432 ; *Bank of Auburn v. Throop*, 18 Johns. 505.) The transfer of the mortgage to the complainant, merely gave to him a legal title in the proceeds of the sale on the execution, in accordance with the equitable right with which he was before vested, to have such proceeds applied to the extinguishment of his liability for Reuben Moak.

Aside from this, the assignment of the mortgage, carried with

it the debt, and by consequence, all the incidents to its payment, which the mortgage had effected or could effect. It transmitted the mortgagee's right to an account, or to an action at law, for the chattels which had been sold, as well as his title in those which remained. The objection of a remedy at law was not raised till the hearing. It does not show an entire want of jurisdiction in this court, if it were well taken. But I think under the circumstances, the suit was well brought in equity.

The complainant is entitled to a decree for an account against W. T. Moak; and as Reuben is a party, it may be extended to his agency in the matter, while acting, as he represents, under his son William.

If W. T. Moak elect to disaffirm the mortgage, he must account for the value of the goods, with interest from the time he received them from Alexander Moak. If he prefer to affirm the transaction, he must account for the amount of the mortgage with interest, being credited thereon with the net proceeds realized by the complainant from the goods which he took, and with all payments made, or off-sets which ought to apply on the mortgage debt. As to the payment made by him to the Robinson's, so much of it as was for a debt or liability of the complainant, will be a proper off-set. Interest will be charged and allowed as shall be just.

There must be a reference to a master to take and state an account on these principles. If W. T. Moak elect to account for the mortgage, affirming it, there will be no account against Reuben Moak, and the bill will stand dismissed as to him, without costs. In case the mortgage shall be disaffirmed, the only direction as to costs, will be that neither party is to have costs against the other, anterior to the decree. The complainant ought not in any event to have costs against W. T. Moak, prior to the decree, because he was not competent to determine his election, until since the proofs were closed. With these exceptions, the question of costs, and all further directions, must be reserved until the coming in of the master's report.

The complainant may have a receiver of the proceeds of the goods which were left with the Moak's, when the bill was filed, if he deem it advisable to incur the hazard of paying the ex-

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pense of the appointment. Such debts as arose from the goods mortgaged, may be taken by the receiver.

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ONE purchasing the shares of some of the tenants in common of land, pending a suit in equity for its partition, becomes seised of such shares; and if he die, and the decree in the suit direct the land to be sold, his widow will be entitled to her dower in the proceeds arising from his shares.

On such a purchase, and a subsequent sale under the decree in the suit, the inchoate right of dower of the purchaser's wife, and all liens affecting his share, become impressed upon the proceeds of the sale.

A purchaser under a decree of the court, whose purchase has been confirmed, and who has paid a part of the price, becomes equitably seised *pro tanto*, and his wife acquires in equity, an inchoate right of dower in the land, subject to the payment of the residue of the purchase money.

As between the widow and creditors of the decedent, she is not subjected to any portion of the costs of administering a fund in which she has a dower right.

Albany, January 14; March 17, 1846.

THIS case came before the court upon exceptions taken by the creditors of Henry C. Barnes, to the report of the Vice-Chancellor of the third circuit, acting as a master, made under an order of reference upon the petition of Huldah D. Barnes, the widow of Henry. The material facts may be thus stated.

The suit was originally for the partition of a farm in Canaan, in the county of Columbia, of which Ebenezer Church died seised in 1835. He left a widow, seven children, and grand children the issue of a deceased daughter named Fuller. All of these persons were parties to the suit. Pending the partition suit, H. C. Barnes, at different dates in the year 1836, purchased the title and interest of the widow and five of the children of E. Church, all of whom executed conveyances to him. In June, 1837, a decree of sale was entered; and in November following, the farm was sold by a master of the court, and Barnes became the purchaser for \$4800. An order confirming the sale was entered in December, 1837. Under the decree and an order modifying it, J. G.

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Palen Esq. a master of the court, reported June 2d, 1841, that by reason of advancements made to them by the intestate, in his life time, Vernile and Nathaniel Church, (two of the children and heirs,) had no right or interest whatever in the farm, or in the proceeds of the sale; and that such proceeds, deducting the dower of E. Church's widow, were \$3992 84, of which H. C. Barnes was entitled to \$3312 14; and the five children of Mrs. Fuller, to the residue, it being \$136 14, for each, with interest from the sale. This report was regularly confirmed.

Barnes had taken possession of the farm at the time of his purchase in 1836, and died in possession in September, 1842, leaving the petitioner his widow, and five children. He had never completed his purchase at the master's sale, nor received a master's deed. There were numerous judgments against him, and he died insolvent. Under an order of the court made in this suit, the farm was again sold in August, 1844, and brought \$6000. The sale was confirmed, and a deed executed to the purchaser by the master.

Mrs. Barnes then presented her petition, by which she claimed her dower in seven eighths of the fund in court, being the proceeds of the sale. Some of the creditors of H. C. Barnes opposed her claim, insisting that she was not entitled to dower; whereupon a reference was directed, to take proof of the facts, to ascertain the specific and general liens upon the farm as against H. C. Barnes, and the rights of all parties to the fund arising from the sale. The Vice-Chancellor reported, December 10, 1845, that the net proceeds of the sale were \$5883 65. That Mrs. Barnes was entitled to her equitable dower in seven eighths of that sum, and that the present value of her dower interest, was \$1078 33. And that sundry judgment creditors, (specifying their names, and the sums due to each, and their priority,) had equitable liens on the residue of such seven eighth parts of the fund. The residue of the fund, one eighth, it was conceded, belonged to the five children of Mrs. Fuller. To this report, some of the creditors, whose liens were abridged or cut off by the allowance of dower to Mrs. Barnes, took sundry exceptions, which now came on to be heard.

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H. Hogeboom, for the creditors.

K. Miller, for Mrs. Barnes.

THE ASSISTANT VICE-CHANCELLOR.—According to my view of this case, Henry C. Barnes, at the time of his death, was equitably seised in fee of the whole Church farm, subject to the payment of that portion of the purchase money which belonged to the heirs of Mrs. Fuller. His contract for the purchase, was made with the court of chancery, through the master's sale, and he had paid the whole consideration, (including the costs of the sale and of the partition suit,) with the exception of the share of Mrs. Fuller's children. On his paying the latter, the master would have given him a deed, as a matter of course. No one of the parties in the above entitled suit, save the Fullers, had any interest whatever in the farm. This was settled by the report of master Palen, and it is not open to be questioned. And in regard to the dower right of Eunice Church, it was merged in and formed a part of Barnes' freehold, as much as did the share which he bought of J. G. Church. The question as to the advancements, had been settled by the report of Mr. Palen, and the parties had acquiesced.

Upon the death of Henry C. Barnes, the expedient of having the farm re-sold, under the original decree in partition, was resorted to. I have not been furnished with a copy of the order for the re-sale, but I presume from the report now before me, that Barnes died insolvent, and this was deemed the cheapest and most expeditious mode of settling his estate.

I cannot conceive of any provision in the order of re-sale, which would divest any equitable right that Barnes had acquired to the farm, by force of the former sale. It could not have been framed or intended, to open the questions which had been settled by the report of Mr. Palen, the master. At all events, I have no evidence from the order itself or otherwise, that such was its scope or operation.

Mrs. Barnes at the death of her husband, was entitled to dower in the whole farm, subject however to a just contribution upon

her part, to the payment of the unpaid purchase money going to the heirs of Mrs. Fuller. (2 R. S. 112, § 71, 72; *Hawley v. James*, 5 Paige, 453, per the chancellor.)

On the sale being made under the order of the court, Mrs. Barnes became entitled to her dower in the proceeds, after paying such unpaid purchase money.

The Vice-Chancellor has however proceeded on the principle of setting apart one eighth of the net proceeds of the re-sale, for the share of the heirs of Fuller; and I must assume that the order directing the second sale made this provision, or one tantamount in its effect. The result is that Mrs. Barnes became entitled to dower in seven eighths of the net proceeds, free from any deduction for the payment to the Fullers. She was unquestionably entitled, with the sanction of the court, to take a gross sum in lieu of her dower interest. And the Vice-Chancellor's report is therefore correct.

Unless the order for a re-sale, opened the report of master Palen, the same result substantially, would be obtained by going back of Barnes's purchase under the decree in partition. By the five conveyances to him from the heirs of Church, with that from the widow, he acquired a legal estate in fee, to the extent of the actual interests of his grantees in the farm. It was not merely five eighths, but it was their entire interest, which by reason of the advancements to the two sons exceeding their proportion, was in fact, as ascertained by Mr. Palen's report, the whole farm, excepting the Fuller share. It is true, this might have remained fluctuating until the value of the farm, and the extent of the advancements were ascertained judicially; but when so adjusted, the conveyances were thereby proved to have been operative, to the extent I have stated.

The pendency of the partition suit, did not affect Barnes' seisin by these deeds. It might end in an actual partition without disturbing his seisin at all; or it might result in a sale which would convert his land into money. But until so converted, it was land, subject to the lien of judgments and mortgages against him, and subject also to his wife's inchoate right of dower. A purchaser under the decree would take a good title, clear of all such

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liens and dower right, but they would become impressed upon the proceeds of the sale, and on being brought to the notice of the court, would be protected as against Barnes himself or his voluntary assignees. (See *Westervelt v. Haff*, before Assistant Vice-Chancellor, August '20, 1844, not yet reported,) in which this point was held as to a mortgage, executed pending a suit in partition, which terminated in a decree for a sale.(a)

As to the costs of the proceedings, the case of *Hawley v. Bradford*, (9 Paige, 200,) is an authority for exonerating Mrs. Barnes from defraying any portion of them. Those costs must be borne by the residue of the fund.

The exceptions to the Vice-Chancellor's report are therefore overruled, with costs to be paid by the exceptant; and an order must be entered for the payment of the fund according to the report, first paying out of the same, the costs of the reference before the Vice-Chancellor.

(a) Since reported, 2 Sand. Ch. R. 98.

DOUGLASS v. VIELE and DOUGLASS.

Commissioners in partition, who at the same time were admeasuring dower in the same lands under an order of the surrogate, in dividing the lands between three tenants in common, after assigning dower to the widow, allotted the residue to the owners in such manner that two of them took their shares free from dower; the commissioners intending to set off to the third, an infant, the lands subject to dower, with a small parcel besides; and that arrangement was agreed to by one of the owners who was an adult, and by the guardians *ad litem*, of the two other owners who were infants. By their report of the partition, the commissioners omitted to mention the dower lands, or to allot them to the party intended, but allotted to him merely the small parcel which was free from dower; and the report was confirmed, a judgment entered thereon, and the error was not discovered till nearly thirty years afterwards, the widow having survived all the intervening period. The dower lands added to the small parcel, made that share equal with each of the other shares allotted in the partition.

Held, that the agreement between the adult and the guardians, was invalid, and that the occupation by the two who received their full shares, and the sale of such shares, were not a ratification of such agreement, or an acquiescence in the third owner's right to the dower lands.

Held, further, that on the ground of accident, a court of equity could grant relief, and could give full effect to the defective partition, according to the original design of the commissioners, and the justice of the case.

Albany, January 17; March 19, 1846.

THE bill in this cause was filed, April 4, 1844, by Samuel Douglass against Hannah Viele and Stephen P. W. Douglass, for relief in respect of a parol agreement on the partition of the lands of Samuel Douglass, deceased, the father of the parties, who died intestate on the 14th of December, 1811. The material facts exhibited by the pleadings and proofs, are in part to be found in the opinion of the court, and referring to those, may be briefly stated as follows:

S. Douglass the elder, died seised of about three hundred and eighty acres of land in Pittstown in the county of Rensselaer. His only heirs were Hannah, the wife of Abraham L. Viele, a daughter of his first wife; S. P. W. Douglass, the infant son of the intestate's deceased son William S., who was also a child of his first wife; and the complainant, an infant. The intestate's

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widow, the mother of the complainant, subsequently married Mr. Gardner. Early in 1814, an ejectment was commenced in behalf of the infant S. P. W. Douglass, against the tenant of the heirs, to recover about sixty or sixty-two acres of the intestate's lands, known as the east part of Lot No. 120; it being claimed that William S. Douglass died seised of that parcel, and that it descended to his son, and never belonged to the intestate. The cause was tried, and a verdict found for the defendant, on which judgment was entered on the 5th of September, 1814. Prior to this, and on the 8th of November, 1813, the intestate's widow petitioned the surrogate of the county of Rensselaer, to have her dower in the three hundred and eighty acres admeasured; an order was made for the citation of the heirs, and a subsequent order appointing three admeasurers. In the book of minutes of the surrogate, there was entered what purported to be the report of the admeasurers, signed by one of them only. And no other proceedings on the subject, were, on diligent search, to be found in the surrogate's office. It was proved that after 1814, and many years ago, the records and papers of that office, were kept in a most loose, careless and disorderly manner, so that the most valuable documents might have been abstracted from the files, and that many were probably lost through sheer neglect. It appeared by the parol evidence in the cause, that the admeasurers proceeded to set off the widow's dower, and in so doing, made a separate admeasurement of her dower in the sixty or sixty-two acres claimed by S. P. W. Douglass. They set off to her in that tract, eighteen 66-100ths acres, and in the remaining premises of the intestate, they set off to her about eighty acres, for her dower therein. The widow immediately took possession of the lands assigned to her for dower, and continued in possession till the hearing of this cause.

Before the admeasurement took place, and on the 2d of February, 1814, A. L. Viele presented his petition to the Rensselaer Common Pleas, for the partition of the lands of the intestate, omitting the disputed sixty-two acres. In this proceeding, the complainant and S. P. W. Douglass were made parties, and being infants, were represented by their guardians *ad litem*. The same persons who were admeasurers of the dower, were

appointed by the court, commissioners to make the partition. The order for partition, directed them to divide the whole premises described in the petition, one-third to each of the infants, and one-third to Viele and wife. They made their report on the 4th of March, 1814, which was confirmed, and judgment was perfected thereon, March 16th, 1814. By their report, they allotted in severalty, by metes and bounds, eighty-five and one-half acres to Viele and wife, one hundred and one and one-half acres to the defendant S. P. W. Douglass, and forty-five and one-half acres to the complainant; and they made no division of the residue which was set off to the widow for dower in the proceeding in the surrogate's court, nor any allusion whatever to that residue, otherwise than by bounding certain parcels by it in the description of the allotments. In their allotments, they gave to the complainant, three separate parcels, all adjoining the widow's dower, and so situated as to be occupied with it as a farm, and they gave him a part of the dwelling house, the residue of which was admeasured to his mother as dower.

A map was introduced in evidence, which was made by one of the commissioners for the purpose and was used on making the partition, which illustrated the several allotments. The same map was used on admeasuring the dower, and exhibited that admeasurement. It was proved abundantly, that the admeasurement of dower and the partition, were made at the same time and in reference to each other. And that the commissioners in their actual allotment and division, had set apart to the complainant the forty-five and one-half acres, and also the eighty acres allotted to his mother for dower, subject to such dower; as being equal to the allotment of one hundred and one and one-half acres to S. P. W. Douglass, and to that of eighty-five and one-half acres to Viele and wife, both of which allotments were exonerated from dower. And that this was done for the reasons, that Viele and wife wanted to sell their share, and to have it free from dower; there was no relationship between the widow and S. P. W. Douglass, which made it desirable or convenient to have the latter's interest connected with or subjected to her's; and the long minority then in prospect for the complainant, would

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obviously lead to his residing with the widow for many years, and their identity of feeling, would render his share, if in part subject to her dower, less inconvenient than such an allotment would be to either of the other parties.

On the 1st of November, 1814, Viele and wife sold and conveyed to R. & E. Geer, the eighty-five and one-half acres allotted to them in the partition.

After the termination of S. P. W. Douglass's ejectment, and in the year 1815, the same commissioners proceeded, as if under an order of the court, to make a partition of the parcel of sixty-two acres. They allotted to Viele and wife twenty acres, to S. P. W. Douglass twenty acres, and to the complainant three and one-half acres, leaving as before the widow's dower, (eighteen 66-100ths acres,) in this parcel, unnoticed. It was intended by them as before, that the complainant should have the remainder in the eighteen 66-100ths acres after his mother's death, together with the three and one-half acres, to make him equal with each of the other heirs.

It was proved that on both these partitions, it was expressly agreed, by and between Viele and wife, and the guardians *ad litem*, of the infants, Samuel and Stephen P. W. Douglass, acting in their behalf, that those small allotments should be made to the complainant, so that the other two heirs might have their entire interest in the lands set off to them, free and discharged from dower; and that the complainant should have the whole of the lands assigned for dower, after the death of his mother. It was also proved that the allotments made to Viele and wife and to S. P. W. Douglass, in the partitions respectively, were each worth full as much as those made to the complainant, including with the latter the value of the lands assigned for dower, subject to the widow's life estate.

There was no record in the court of common pleas, nor any proceeding, relative to the partition of the parcel of 62 acres in 1815. It was however acted upon by the parties. On the 25th of December, 1815, Viele and wife conveyed to the complainant and his mother, their share of the 62 acre parcel. And on the 29th of August, 1828, S. P. W. Douglass conveyed to the complainant, all that share of his grandfather's lands, which on the par-

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tition thereof was allotted to him, containing 125 acres. The description in his conveyance was identified as embracing the 20 acres, part of the 62 acres, so allotted to him in 1815, as well as the 101½ acres set off to him in 1814. Previous to this deed, and in 1827, S. P. W. Douglass had executed a mortgage on the premises, in which there was a similar recognition of the partitions. The attorney who conducted the first partition, deposed to his belief that there was a like partition of the sixty two acres, in the common pleas; and there was some testimony corroborating that fact. A. L. Viele died several years ago, and the commissioners who made the partitions, and the two guardians *ad litem* in the partition suit, were also dead. The defect in the complainant's title to the dower lands, was not discovered till a short time before this suit was commenced.

S. P. W. Douglass put in an answer, traversing the agreement made on the partitions, and the other facts on which the complainant claimed the entire dower lands; and insisted upon his right to an undivided third of the same. As to him, the cause was heard on pleadings and proofs. The defendant, Hannah Viele, was proceeded against as a non-resident, and the cause was heard as to her, on a master's report, finding the truth of the facts stated in the bill.

H. W. Strong, for the complainant.

J. Edwards, and *S. Stevens*, for the defendant Douglass.

THE ASSISTANT VICE-CHANCELLOR.—There is no doubt but that William S. Douglass was of age when he conveyed the east part of lot No. 120, to his father in 1804. The defendant himself recognized the title of Samuel Douglass the elder in this tract, by conveying it in 1828, as allotted to him in the partition of the intestate's lands. It is to be assumed therefore, that when Samuel Douglass died in 1811, he was seised of the premises described in the bill, and containing about 380 acres.

Nor is there any doubt, but that the dower of his widow was admeasured and set off to her at the close of the year 1813. The documentary evidence of this is wanting, in consequence of the

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shameful manner in which the records were kept in former times in the surrogate's court in the county of Rensselaer. But the widow has been in possession under that admeasurement more than thirty years, and all the parties in interest have acquiesced in it in such a manner, that they are precluded from questioning it at this day. It appears that the dower was set off in the whole farm, in three distinct parcels. The dower in the east part of lot No. 120, was in one of these parcels, separate from the rest. It also appears that the three admeasurers of dower were the same persons who were the commissioners in partition, and the proof is distinct, that they prepared for and arranged the first partition at the same time that they admeasured the dower, and in connection with it, although the legal proceedings in the partition were not actually commenced.

The record of the partition of all the farm, except the east part of lot 120, is produced from the Rensselaer common pleas. The petition by A. L. Viele, describes the farm, omitting the tract last mentioned. This was caused by the pending ejectment suit for that tract, which had been brought in the name of the defendant Douglass. The allotting a part of that for dower, could injure no one; but embracing it in a partition with other lands, might lead to injustice, if the title proved defective.

The court proceeded to adjudge, (as shown by the record,) that the parties were respectively entitled, each to an undivided third of the lands described in the petition, subject to the right of dower of the widow, and directed a partition to be made accordingly, of the premises described *in the petition*, and appointed commissioners, for that purpose. The report of the commissioners is then introduced and recited. It sets out with a statement that they have *divided the premises, whereof partition is directed*, according to the rights of the parties, and have allotted to each of them the parcels described. And the judgment of the court is then entered, that such partition of the said premises be valid and effectual in the law.

The record discloses the singular fact, that in the allotments therein made by the commissioners, there is an entire omission of eighty acres of the premises described in the petition; and it appears that the omitted eighty acres, were set apart

and admeasured to the widow for dower in the other proceeding. And neither of the allotments made in the partition, are made subject to dower. The widow's dower is butted upon, in the description of one of the allotments, but is not otherwise referred to. By the partition, eighty-five 56-100ths acres were allotted to Viele and his wife, for their third part; one hundred and one and one half acres to the defendant Douglass, and forty-five 53-100ths acres to the complainant. The two latter were infants, and were both represented in the partition suit, by their guardian's *ad litem*.

It is satisfactorily proved, that the lands allotted to Viele, were worth as much by the acre, as those allotted to the complainant; and the part set off to the defendant Douglass, was worth nearly as much by the acre, and fully equal in aggregate value to Viele's. Each of the latter allotments was made in two parcels. The complainant's was made in three parts, and all adjoining the widow's dower as admeasured, and so situated, as to be occupied with the dower. Indeed, one part of his allotment *zig zags* around a portion of the dower in such a narrow belt, that, judging from the map, it could not be used except in connection with the dower land. A part of a dwelling house is given to the complainant, the residue of which is allotted to the widow for dower.

The testimony in the cause proves clearly, how this strange partition came to be made. The complainant was the infant son of the widow, while the defendant Douglass was the grandson of the intestate, descended from a former wife, and Mrs. Viele was a daughter of the first wife. It was morally certain that the widow and her son would reside together for many years, and their occupancy would be joint. Viele and his wife desired to sell their portion of the farm, and to that end, wanted an allotment free and clear of the dower of the widow. And it was agreed by all the parties, the guardians acting for the infants, that the partition should be so made, that the whole interest of the Viele's and the grandson, should be allotted to them in severalty freed from the dower, and that the complainant should have in severalty the lands allotted for dower, subject to his mother's life estate, and so much more land as would make him equal to his two co-heirs.

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The partition was made on this footing, but unfortunately was not so reported to the court, and was not embraced in the judgment rendered in the suit.

After the termination of the suit for the east part of lot No. 120, the same commissioners made a partition of that tract, under the same agreement, and in the same manner, as the other lands. The tract contained about sixty-two acres. Of this, eighteen 66-100 acres had been set apart for dower, in the proceeding for that purpose. The commissioners then allotted to the Viele's about twenty acres, to the defendant Douglass about twenty acres, and to the complainant about three and one half acres, adjoining the portion set off to his mother for dower.

There is no record evidence to be found of the partition of the sixty-two acres. But it is referred to and adopted, in the deed from Viele and wife on the 25th December, 1815, and in effect, by the defendant Douglass in his mortgage in 1827, and his deed in 1828.

The widow in 1814, was thirty-six years of age. Estimating the value of her life estate in the ninety-eight 66-100 acres assigned to her for dower, it is demonstrable that conceding to the complainant the remainder in fee in severalty in that portion, together with the allotments made to him in the two partitions; he did not receive in the division of his father's estate, as much as either of the other two heirs.

To illustrate this, I will assume that the two hundred and thirty-two 59-100ths acres, divided to the heirs in the first partition, were worth double the eighty acres set apart for dower, in the same portion of the farm; and will estimate the latter at \$28, per acre, and the former at \$20, which will be near enough for this purpose. The widow's life estate in the eighty acres, was worth on the principle of life annuities, using the Northampton tables and omitting fractions, the sum of \$1497. The remainder belonging to the complainant in the eighty acres, would therefore be \$743. His forty-five 53-100 acres in fee, at \$20, would amount to \$912, making his whole share of the land, including the dower, to be \$1655.

The eighty-five 56-100 acres allotted to the Viele's, at the same valuation, was worth \$1711. And the one hundred and one and

one half acres set off to the defendant Douglass, if valued at only \$16, per acre, would be within a few dollars of the complainant's share, dower and all.

It is perfectly obvious, that if these partitions are to stand as made by the commissioners, and the other heirs are to share equally with the complainant in the dower lands, after the death of the widow; most flagrant injustice will be done to the complainant.

This consequence will not, of itself, warrant the interference of the court, unless there be some proper ground for relief, founded upon legal principles. The complainant claims relief upon two grounds, viz.: the agreement at the time of the partition, and the acts of the parties ratifying and confirming it.

First. As to the agreement, it will not avail against the defendant, because he was an infant, and his guardian *ad litem* had no authority to contract for him. His subsequent assent to the partition as made, and his action under it, was not an adoption of the agreement; for it does not appear that he so acted, with knowledge of its existence.

Next, as to the ratification and acquiescence. The defendant found certain allotments made to him by a judgment in partition, and he was warranted in availing himself of them, to their full extent. No occasion has arisen for the distinct assertion of his claim to the third part of the land admeasured for dower.

I do not think that either his mortgage or his deed, contain any recognition of the parol agreement, or any waiver of his rights in the dower lands. His conversations relative to the personal estate, and his silence as to a further interest in the farm, in connection with his necessitous circumstances, furnish a strong argument in favor of the presumption that he was conscious he had no further interest in the land, in point of justice and good conscience.

There is another ground, on which I think the complainant may be relieved, without trenching upon the salutary doctrine of the law, that a judgment is conclusive between the parties to it, and cannot be modified collaterally.

The judgment in 1814, is defective on its face; and there is no question but that the subsequent partition of the sixty-two

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acres was like it in all respects. Not only the direction of the court, but the statute, imperatively required the commissioners to make partition of the whole premises embraced in the interlocutory judgment for partition. (1 R. L. 509, s. 4.) Their report shows, that they actually allotted only two hundred and thirty-two acres out of the three hundred and twelve embraced in the petition and judgment, and they neither advert to the dower, or state that the eighty acres are reserved for a future division.

There was a palpable miscarriage in the performance of their duty, owing doubtless to the admeasurement of dower, *pari passu*, which they did not consider was in another court, and could form no part of the record ; and to the parol agreement as to the share of the complainant, which they probably deemed to be valid. The omission was not brought to the notice of the court, because by the practice in the courts of law, the report of the commissioners is confirmed as of course unless it be opposed, and judgment is entered thereon, *sub silentio*.

I think, considering the infancy of the complainant ; the obvious defect in the proceedings of the commissioners as reported to and confirmed by the court of common pleas, (they being for this purpose, officers of the court, and not mere agents of the parties ;) the agreement which led to their miscarriage, and the gross inequality and injustice, which will result from giving full effect to the defective partition irrespective of that agreement ; that this is one of those cases of *accident*, which imperatively calls for the interference of a court of equity. The difficulties have arisen from acts and omissions, which are not the result of any negligence or misconduct of the complainant, and which unless redressed, must produce events wholly unforeseen when the acts occurred, and which the actors would have most sedulously guarded against, if they had been anticipated.

Without relief here, the complainant must be subjected to an unjustifiable loss, for which he is in no wise responsible, and the other parties will derive an unconscientious advantage from the error or oversight of the commissioners.

It is in vain at this period, to refer him to the court of law. In 1815, that court might have vacated its judgment, and referred the matter back to the commissioners. But more than

thirty years have elapsed, the commissioners are dead, and a part of the lands divided have been sold and conveyed to strangers. The common pleas could not interfere. It is otherwise in this court, where the more flexible modes of proceeding, enable it to mould its relief, to suit the infinite variety of circumstances which require its interposition.

A decree can be made referring it to a master, to ascertain the relative values of the several allotments set off in these partitions, at the time they were made, and the then value of the widow's life estate in the respective dower lands assigned to her, and the value of the remainder therein on the principle of life annuities. And he should report what sum, if any, the complainant ought to pay to the respective defendants, to make the parties equal, on his retaining the entire remainder in the dower lands, together with the lands specifically allotted to him in the partitions.

And with these provisions, there should be a declaration that the allotments in severalty made by the commissioners, are to remain valid and effectual ; the court assuming to do justice between the parties, in respect of the premises omitted in the partitions.

The lapse of time, which renders it impracticable to have the error redressed in the original suits, does not preclude the complainant from relief in this instance ; because no claim has been made until recently, in hostility to the arrangement between the Viele's and the guardians of the infants, in 1814. Until such a claim was asserted, he had a right to suppose that the arrangement was recognized and acquiesced in by the parties.

The case against Mrs. Viele is fully made out by the master's report on the facts, so as to entitle the complainant to the same decree against her, as I have sketched against the defendant Douglass.

I will direct the entry of a decree accordingly ; reserving all other questions and directions, till the coming in of the master's report.

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THE owner of two lots, which had been sold on an execution against him, agreed with M. that she should buy one of the lots, and pay the price by redeeming both from the sheriff's sale. M. was to take a deed from the sheriff, pay all liens and charges, and on receiving the surplus, beyond the price of the one lot, with interest, at a day fixed, was to convey the other lot to the vendor; or if such payment were not made, was to retain both lots. The vendor was by a like covenant, to give possession of the lot sold to M.—*Held*, that by the agreement, M. became the purchaser of the one lot, and took the other lot as a security for her advances beyond the price of the former; and that she was bound to convey to the vendor, on being refunded, such excess with interest.

Held further, that if the contract were to be treated as an agreement by M. to sell the other lot to the former owner, on payment of such excess, and receiving possession of the one at the time stipulated; a partial failure to deliver possession at that time, would not warrant M. in refusing to convey the other lot, on receiving the excess.

A bill for redemption, which sets forth a liquidation by the parties of the sum payable, and an offer to pay that sum, which was refused, need not contain an offer to pay what may be found due on an account to be taken.

Albany, January 23, 24; March 21, 1846.

THE bill was filed, by William R. Barton, against Hannah May, on the 22d day of December, 1843, and the cause disclosed the following facts:

James Maullin, being the owner and in possession of lots No. 307 and 308, in the third division of the village of Lansingburgh, the same were sold by virtue of an execution against him by the sheriff of the county of Rensselaer, on the 15th day of October, 1840. The time for Maullin to redeem having expired, he applied to the defendant, proposing to procure another judgment against himself to be assigned to her, so that she might redeem the premises, and thereupon on the 15th of January, 1842, an agreement under seal was executed by Maullin and the defendant, to the effect following. It recited that the defendant proposed to purchase lot No. 308, by redeeming that lot together with No. 307, from the sheriff's sale before mentioned, for which lot 308 she proposed to pay \$1200, and was to apply the same to the discharge of the incumbrances on the premises. It was then agreed that she should be at liberty to pay all liens, taxes

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and ground rents on lot 308, and if they exceeded \$1200, she should retain and hold the title of lot 307, until the excess with interest was refunded by Maullin, when she would convey to him all her right and interest in lot 307 acquired by the redemption. Maullin was to give her possession of lot 308, on the first day of May, 1842, and if he did not, he was to pay her \$50 per quarter as long as she remained out of possession; and he was to pay interest on the \$1200, till the first of May, 1842. She was not to convey lot 307 to him, until she received full possession of lot 308, and payment of the sum stipulated, if kept out of possession, and of all costs and expenses incurred by her in making the redemption. Maullin was to pay the excess over \$1200, and the other items stipulated, within one year from May 1, 1842, or she was to retain both the lots; and until that time, she was not to commence any proceedings to recover the possession of lot 308.

A judgment against Maullin was assigned to the defendant, who thereupon made the redemption agreed upon, and on the 18th day of January, 1842, received a deed of both lots from the sheriff.

On the first day of May, 1843, Maullin having remained in possession of both lots, a further agreement under seal was executed by the parties, and annexed to the former instrument, by which the amount which M. was to pay to the defendant, was liquidated at \$285 11, with interest from that date, and the time for its payment was extended four months from that date. The defendant was to be at liberty to pay the back ground rent on lot 307, and the sum paid therefor, with costs and expenses, was to be refunded to her. The possession of lot No. 308, was to be forthwith delivered to the defendant, and any buildings standing thereon occupied by Maullin, were to be removed forthwith.

At this time there was a store on lot 308, on the north line, fronting on the street, and part of the wooden buildings on lot 307, occupied by Maullin, encroached from twenty inches to three feet on the south line of lot 308. The lots were each fifty by one hundred and twenty feet. The defendant at once entered upon the possession of lot 308, with the exception of the gore of land covered by the defendant's buildings. She had previous to

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this, made some arrangements for building a brick dwelling on lot 308 during the summer of 1843, intending to place it on the line between that and lot 307. By the testimony she claimed to have sustained great damage, because Maullin's omission to remove the encroachments on the line of the lots, prevented her from going on with her building till the ensuing year. The encroachment was actually removed on the first day of September, 1843. The buildings occasioning it were old, and of a very light and trifling character, and could have been removed so as to stand wholly on lot 307, in a single day.

On the 31st of August, 1843, Maullin assigned the two agreements, and all his right and title to lot 307, to the complainant; who on the next day notified the defendant of the fact, and tendered and offered to pay her the \$285 11 and interest, and requested her to execute a deed to him for lot 307; which she refused to do, on the ground that full possession of lot 308 had not been delivered to her as the contract provided, and that she was obligated to pay certain ground rents of the premises, and no tender of the same was made. As to the rent, she had promised to pay it, but had not in fact paid it at the time of the offer.

A few days after, the tender was renewed with the addition of such ground rent, (which she had paid in the meantime,) and \$42, for any damages she might have sustained by Maullin's delay in removing the buildings to the line of the lots. The defendant still refused to convey. Some negotiations and correspondence ensued, without any result, and then the bill was filed, praying a specific performance, the execution of a conveyance, and general relief; the complainant offering to pay the monies tendered, which he after his offer deposited in a bank, subject to the defendant's order.

The answer set up Maullin's non-performance of his agreement to deliver full possession of lot 308, and that his omission caused her great damages. It insisted that she was not bound to convey the lot 307, and that it belonged to her.

A replication was filed, and testimony taken. The cause was brought to a hearing before the vice chancellor of the third circuit, who on the 28th day of January, 1845, made a decretal order referring it to a master, to ascertain what damages, if any,

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the defendant had or might sustain, in consequence of not having had full possession of lot 308, according to the agreement.

The master reported in effect, that the defendant had sustained no damages in consequence of the non-delivery of the possession, and that the tender to her on the first of September, 1843, was \$2 83 more than she was then entitled to receive.

The cause now came on to be heard, on the master's report, the proofs taken before him, and the equity reserved.

C. C. Parmelee and Ira Harris, for the complainant.

H. P. Hunt, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The interlocutory decree, directed a reference to ascertain what damages, if any, the defendant had or might sustain in consequence of not having full possession of lot No. 308, forthwith after the first of May, 1843. I cannot understand this otherwise than as an adjudication, that the complainant's bill was sustained, leaving the terms of the relief to be adjusted upon the coming in of the master's report.

The defendant however, strenuously insisted that the decree was a mere order by consent ; and the cause having been fully argued on the merits, I will examine it as if there had been no interlocutory decree.

The effect of the contract of January 15, 1842, was this. The defendant became the purchaser of lot No. 308, for \$1200 ; and she was to advance for James Maullin, all the money that was requisite in addition to the \$1200, to discharge the liens and incumbrances on both lots. For her security, she was to take the title to lot No. 307, in her own name, and retain it until fully paid ; and Maullin was to pay her interest on the \$1200, till May 1, 1842, then a rent of \$50 a quarter, so long as she was kept out of possession of lot No. 308, and he was to pay the advances beyond the \$1200, on the first of May, 1843, with interest thereon, and all the costs and charges attending the transaction. There was an agreement on the part of Maullin to pay these several amounts, on which the defendant might have maintained an action of covenant, after the 1st of May, 1843. The

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forms of the conveyances through which she derived the title, are wholly unimportant. Those forms were a part of the contract, and their effect is the same as if Maullin had conveyed directly to the defendant, on an agreement to discharge mortgages to a like extent.

I examined the subject of conveyances intended as a security, in *Brown v. Dewey*, (1 Sandford's Ch. R. 56,) and referring to that case and the authorities cited, it is sufficient to say here, that after she received the sheriff's deed in January, 1842, the defendant held the title of lot No. 307, as a security for the fulfilment of Maullin's stipulations contained in the contract.

The subsequent agreement dated May 1, 1843, merely extended the time of payment to Maullin, and liquidated the sum which was due for the advances and charges beyond the \$1200, and the intermediate interest and the rent of lot No. 308. It contained an agreement by Maullin, to deliver the possession of that lot, and to remove the encroaching buildings forthwith. It contained no clause forfeiting his right to redeem lot No. 307, in default of payment of the money or of removing the buildings; and if such a clause had been inserted, it would have been nugatory. (See *Remsen v. Hay*, 2 Edw. Ch. R. 535.)

The result is, that on the first of September, 1843, the complainant had a perfect right as the assignee of Maullin, to have a conveyance of lot No. 307, on the conditions provided in those two instruments.

The defendant refused to acknowledge his right, and interposed a claim for damages, by reason of Maullin's neglect to remove his buildings on lot 307, which encroached on lot 308. This is the claim which the Vice-Chancellor referred, and the master has reported that she sustained no damages in consequence of the continuance of those encroachments from May till the first of September. I have looked into the testimony, and am satisfied that the master's conclusion is correct. The defendant does not claim in her answer, any damages by reason of her being subjected to respond to Aikin on her building contract; and the loss alleged in argument and deduced from the probable enhanced rent she would have received from her new building, is not supported by the proofs.

The removal of the buildings, is shown to have been a very trivial affair, and if the defendant had really been in earnest about erecting her house in May, 1843, I have no doubt that the removal would have been accomplished by Maullin on request, or by the defendant herself, if he had continued to neglect it. The truth is obvious, that she and Aikin had given up the idea of building there, during the summer of 1843; and this small affair was a mere pretext to cover her refusal to give up lot No. 307, after she had become persuaded that the deed of that lot might be used to defeat Maullin's rights entirely.

If these contracts were to be treated as an agreement to sell lot 307 to Maullin, and not as a security, it would not alter the case. No court of equity would refuse to enforce it, on so unimportant an omission as that set up in respect of the encroaching buildings.

It is objected to the bill, that it was not framed for a redemption; and if it were, it is fatally defective for the want of an offer to pay what may be found due on an account to be taken. I think there is no force in this point. The bill states the facts, and an offer to pay more than was due, and it prays for a conveyance, as well as general relief. No account was necessary. There were no rents to be accounted for by the defendant, nor any items against her. The sums to be paid were definite, and the only computation requisite, was that of interest.

The answer charges some fraud, in the transfer from Maullin to the complainant. It is an indefinite charge, not proved; and is not stated as a matter of which the defendant could avail herself.

The first tender was of a sufficient sum. Neither the ground-rent nor the assessment had been paid at that time. The subsequent tender included all these charges, and was also sufficient. As the amount was immediately placed in the bank, subject to her disposal, and has since remained there, she must accept it without interest.

I have struggled to find some excuse upon which to relieve this woman from the costs of the suit, but without success. The offer to arbitrate about the damages, was one which the complainant was under no obligation to accept. In this suit, the de-

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fendant does not litigate for these damages merely. She stoutly controverts the whole claim of the complainant, insists that she owns lot 307, and is not bound to convey it at all, and adheres to this position to the last. Whether it be owing to her cupidity, her obstinacy, or to bad advice, or all these combined, she has been the cause of this suit, and she must defray its expenses.

There must be a decree for a conveyance of lot No. 307, to the complainant accordingly, with costs. The defendant is entitled to the money deposited, which was tendered to her, and if she has paid ground rents or the like, *pendente lite*, which were not covered by the tender, the same with interest may be allowed to her and deducted from the complainant's costs.

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A devise of a farm to four persons in fee, to be equally divided between them ; and in case either of them died without issue living at his death, then the share devised to him, to be equally divided between the survivors and their heirs forever ; creates a vested estate in fee in each of the four devisees, in an undivided fourth of the farm, determinable as to each on his dying without issue living at his death ; and the devise over is a valid future estate in expectancy, or executory devise.

Where the court of chancery, under the statute authorizing the sale of infant's lands, directed the sale of a farm, in which four infants as tenants in common, had a fee determinable as to each on his death without issue, and in which there was a devise over to the survivors upon such contingency ; it will be deemed that the court intended that the purchaser should acquire the whole title, and on any of the proceeds coming within the control of the court, it will require the infants on becoming of age, to convey to the purchasers, as a condition of their receiving such proceeds.

The conversion of lands of infants into personalty, by means of a sale under the statute, does not alter the character of the property, in respect of those who had interests in the land which might be affected by such an alteration.

Thus, where all the infants shares were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold ; it was held that on the death of one, by which the devise over in her share would have taken effect, if the land had not been converted, her share of the proceeds must be paid to the

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executory devisees, and that neither her husband nor her administrator had any right to such share.

The interest which accrued on the proceeds in her life time, belongs to her administrator.

The orders of the court, made on the sale of infants lands under the statute, and distributing the proceeds, though conclusive between the infants and purchasers, do not conclude the infants as between themselves, as to their respective rights and interests in the fund.

A purchaser under an order for the sale of infants lands, who has never been evicted or disturbed in his possession, cannot resist the foreclosure of his mortgage for the purchase money, on the ground that he did not obtain a good title.

A controversy decided between co-defendants, in respect of the fund sought and recovered by the bill; where the material facts were stated in the bill, and their respective claims were argued at the hearing.

Albany, January 17; March 20, 1846.

THE bill was filed January 23, 1845, by John M. Davison, clerk of the court of chancery, for the third circuit, to foreclose a mortgage executed to him by the defendants Walter De Freest and wife and George J. Sharp and wife, for \$4615 42, on lands in the town of Brunswick in the county of Rensselaer, under the following circumstances. Coonrod Colehammer, died seised and possessed of the premises, on the 19th day of March, 1838. By his last will and testament, dated May 17, 1837, he first directed the payment of his debts out of his personal property. He then devised as follows;

“Second: I hereby give devise and bequeath unto my four grandchildren, William Colehammer, the son of my son Robert Colehammer deceased, Martin Colehammer the son of my son Stephen Colehammer deceased, and Polly Colehammer and Rachel Colehammer, the daughters of my said son Stephen deceased, all the real and personal property of which I shall die seised and possessed, to be equally divided between them. To have and to hold the same, unto them my said grand children, their heirs and assigns forever.

Third. I hereby also declare that it is my will, that in case of the death of either of my above named grandchildren without issue living at the time of his or her death, then the share of such deceased grand children, devised to him or her as above mentioned, is to be equally divided between the surviving grand children, and their heirs forever. And in case a second and

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third of my said grandchildren shall so die without issue, as aforesaid, his, her, or their share, or shares shall be equally divided among his, her or their survivor or survivors of said grand children and their heirs."

The four grandchildren survived the testator, and in January, 1839, all of them being infants, a petition was presented to the Vice-Chancellor of the third circuit, by the respective general guardians of William and Martin, and by or in the name of Polly and Rachel Colehammer; setting forth, among other things, that their grandfather, Coonrod C., devised to them in fee and absolutely, all his real and personal estate, including the farm in Brunswick, (being the mortgaged premises in this cause.) That each of the infants was seised of an equal undivided fourth of the farm, and that it would be for their interest to have the same sold, pursuant to the statute.

Upon this petition, Stephen Colehammer and Martin Springer, were appointed special guardians of the four infants, for the purpose of making the sale; and the petition was referred to a master in the ordinary course, who reported that the facts stated in the petition were true, and that the interests of the infants would be substantially promoted by a sale of the farm. The Vice-Chancellor thereupon, on the 20th day of February, 1839, made an order confirming the master's report, and authorizing the special guardians to sell all the right and title of the infants in the farm.

The special guardians, pursuant to this order, sold and conveyed the farm on the first day of April, 1839, to De Freest and Sharp, who paid half the purchase money, as and for the shares of William and Martin Colehammer; and for the residue, being the shares of Polly and Rachel Colehammer, they executed their bond, and the mortgage in question, to the clerk of the court. One half of the principal was made payable at the time when Polly should become of age, and the other half when Rachel should attain her majority, and the annual interest in the mean time, to the special guardians. This disposal of the proceeds, was all directed and sanctioned, by the order of the court confirming the sale.

Martin Colehammer, one of the infants died under age and

without issue. Polly Colehammer became twenty one years of age, in September, 1842. She married the defendant William A. Kilmer, and afterwards died intestate and without issue. Letters of administration on her estate were issued to Kilmer.

Besides the mortgagors, William and Rachel Colehammer were made defendants, and the bill stated the principal facts in the case. The mortgagors put in an answer, alleging that they did not obtain a good title to the farm, through the proceedings before the Vice Chancellor and the deed of the special guardians, and insisting that this was a bar to the foreclosure. The Colehammer's claimed that they were entitled to all the proceeds of the mortgage which were the share of Polly Kilmer in the farm; and W. A. Kilmer claimed the whole of that share, as administrator.

M. T. Reynolds, for the complainant and for W. A. Kilmer.

1. The title conveyed by the guardian of the devisees, under the will of Coonrod Colehammer, by virtue of the order of the court of chancery, vested in the purchasers a good and valid estate in fee to the premises conveyed; as whatever be the construction of the will, the whole title was in the parties before the court. There is therefore no failure of title, and the mortgage is valid, and the court will decree a foreclosure as against De Freest and Sharp.

2. The court would make the same decree, whether by the sale under the order of this court, a valid title was or was not given. The deed is a mere quit claim, of such interest as the parties had in the premises; and for that interest, more or less, the mortgagors agreed to give the sums reported, and for part of which the mortgage was executed.

3. There is no pretence of any fraud on the part of the complainant, or those whom he represents. And the mortgagors can no more defeat the recovery of the money secured by the mortgage, than they could recover back the money paid down at the sale.

4. If they were entitled to any abatement in equity, they should have filed a cross bill, and made the two other heirs parties; so that they might have been made to contribute and refund a portion of the monies which they had received.

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5. The mortgagors will be safe in paying the mortgage, and have no interest in the question as to the distribution of the proceeds when paid into court.

6. As to the defendants, William and Rachel Colehammer; they have no interest in preventing a decree of foreclosure. They have no right or interest in the land mortgaged.

7. They are neither of them entitled to any portion of the proceeds of the sale, as the devise over is void.

8. If the devise over is not void, still the last named defendants are not entitled to any portion of the proceeds, as the right of all parties was settled by the proceedings and order of sale, and that order cannot be impeached collaterally.

9. The court of chancery had power in its discretion, to order the proceeds of the sale to be equally divided, and the same to be held absolutely by each, without limitation over, upon the contingency specified in the will. It could certainly have ordered the interest of each to be sold, and the proceeds would then have been absolutely his. The same result was more beneficially produced, by selling entire and making an absolute division of the proceeds.

10. The last named defendants, having received the full benefit of the order distributing the proceeds of sale, and thus secured, (without liability to refund,) an absolute interest in one-fourth of the money to each, cannot now equitably claim any share of the proceeds of the mortgage in suit.

11. If the last named defendants have any claim to the mortgage money, as being the proceeds of the sale of an estate in which they had an interest; then the money should be paid to the defendant Kilmer, as the administrator of Polly Colehammer, and by him applied in due course of administration: The defendants, William and Rachel C., having no prior claim over other creditors.

12. In any event, Kilmer, the administrator, is entitled to receive the interest on the sum of \$2307 71, in arrear and unpaid up to the time of her death.

13. He is also entitled to receive one-third of \$2307 71, the share of the devisee who died before Polly Colehammer, and which vested in her absolutely, on the death of that devisee.

J. Koon, for the mortgagors, contended that the infants had only a determinable fee in the land, that the executory devise over was valid, but that it was doubtful whether the court had jurisdiction to sell the contingent expectant estates. If so, no title to the latter passed to the purchasers, and the bond and mortgage were without consideration, and no decree could be made on the mortgage. On his proceeding to argue these points, the court stopped him; assigning as a reason, that if no title had passed to the mortgagors, it would not prevent a decree for the foreclosure of the mortgage.

D. Buel, Jr., for William and Rachel Colehammer.

I. By the will of Coonrod Colehammer, his four grand-children each took an undivided fourth part of his real estate, (consisting of the premises included in the mortgage in suit.) The estate which each took, was a fee, determinable in case they respectively died without leaving issue at their decease; and in such event, the surviving grand-children took the share of the one so dying.

The devise over to the survivors, was a good executory devise, and the contingency on which it took effect, must happen within a single life in being; consequently it is a good expectant estate under the revised statutes. (1 R. S. 723, 4, §§ 15, 24; Cro. Jac. 590; 2 Black. Com. 173; Fearne on Exec. Devises, 396, 399, Butler's note, *d.*)

The case, before the revised statutes, was fully within the decisions respecting executory devises. (16 Johns. 382; 20 *ibid.* 483; 3 Paige, 281.) And the decisions on wills made since, show that it is a good expectant estate, under the provisions of those statutes. (8 Paige, 483; 10 *ibid.* 140, 151.)

II. It may be doubtful whether the sale by the guardians by the order of this court, passed the title to any more than the determinable estates of the infants, and not the executory contingent estates.

1. Although the order and deed may be broad enough to carry the whole interest, it is I think certain, that if one of the devisees had attained the age of twenty-one, and made a conveyance of all his interest, and then died without issue, his grantee's estate

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would have been determined, and the surviving devisees would have taken his share. (*Anderson v. Jackson*, 16 Johns. 382.)

2. The statute gives to sales by order of the court, the same effect, "as if made by such infant of full age." (2 R. S. 195, § 178, and see § 176.)

3. To give the sale any greater effect, would conflict with the provision in the 176th section. But,

III. If the entire interest of the infants, including as well their determinable estates, as the executory contingent interests, passed by the sale; still the surviving devisees of Coonrod Colehammer have the same right in the proceeds, as they would have had in the land.

The statute regulating sales of infants lands, is most express on this matter. (2 R. S. 195, § 180.) It follows, that as William and Rachel Colehammer survived Polly, (the wife of Kilmer,) they take her share of the proceeds.

IV. The court will settle the questions in this suit. The infants whose lands were sold, are by the statute made wards of the court, so far as relates to such property, its proceeds and income; and are to make order for the application and disposition of the proceeds. (2 R. S. 195, § 179.)

Reynolds, in reply.

The points made by the surviving devisees, are more appropriate for a cross bill, where Kilmer might contest them.

The statute directs the money arising from these sales, to pass as if it were the land; i. e. it is to be distributed as it ought to go between the parties. The vice-chancellor had all this before him, when he made the order directing a separation into four shares, which gave each an absolute interest. The shares of the two youngest were invested *for their use*, by the order; and if any portion had been required for the support of either, its application would have been ordered, without notice to the executory devisees. William C. has doubtless received all his fourth, and his third of Martin's share.

Again, the court only ordered the interest of these two youngest parties sold, and no more was sold, so that this mortgage is for

their actual vested interest alone, and no part of it passed by the executory devise, on Mrs. Kilmer's death.

THE ASSISTANT VICE-CHANCELLOR.—In the case of *Banks and others, Executors of McCarthy v. Walker*, (3 N. Y. Legal Observer, 340,(a) after a full consideration of the subject, I decided that in a suit for the foreclosure of a mortgage given for the purchase money, the mortgagor although personally liable for the debt, cannot set up as a defence, the failure of the title to the land, unless he has been evicted from the possession.

In this suit, the mortgagors have never been disturbed in the possession of the lands. Indeed, no one makes any claim adverse to their title. Whatever may be my views of the construction of the devise in question, it cannot avail the mortgagors as a defence to the suit. At the same time, if there be any room for a doubt as to the conveyance to them having transmitted the title which the court ordered and intended, it is due to the purchasers upon the faith of the order of the court, to make suitable provision for the vesting of such title as may remain in any of the claimants of the fund, before permitting them to receive it on the foreclosure.

The other questions in the cause, arise between Kilmer and the two surviving Colehammer's. I think they may be decided on these pleadings. The bill contains the material facts, and Kilmer's claims were argued at large by his counsel.

There is no doubt but that by the devise, the four grandchildren each took a vested estate in fee, in an undivided fourth of the lands, determinable as to each, on their respectively dying without issue living at their decease; and in that event, the share of the one so dying, was to go equally to the survivors. The latter was a valid future estate in expectancy, but it was not vested.

The two surviving grandchildren do not insist, but that by the sale to De Freest and Sharp, their future interests were well and sufficiently conveyed under the orders of the court.

(a) Since reported, 2 Sand. Ch. R. 344.

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And I will assume, for the argument, that such was the effect of the orders and the sale and conveyance thereby directed.

The order of sale, appears to have assumed that each devisee had an absolute and indefeasible estate in fee, in an undivided fourth part of the lands; and it is contended by Kilmer, that the rights of the devisees were thereby fixed and determined, and that the order cannot be impeached collaterally. Also, that the order for the application and division of the proceeds, is final, and vests the respective shares absolutely, in the manner directed in such order.

As between the infants and the purchasers, the orders may be so far conclusive as to protect the latter; but I do not think that they finally settle any questions between the infants themselves. The statute is express, that the sale shall not give to the infant, any other or greater interest or estate in the proceeds of such sale, than he had in the estate sold. (2 R. S. 195. § 180.) The argument in behalf of Kilmer, directly conflicts with this enactment; and if the orders were more pointed than they are, I do not see how the force of the statute could be overcome.

The same section of the statute, provides that the proceeds of the sale shall be deemed real estate, of the same nature as the property sold. Therefore after the sale, the rights of the four grandchildren in the proceeds, continued precisely the same as they were before. And on the death of Martin Colehammer without issue, the capital of his one fourth of the proceeds, belonged to the other three grandchildren, each taking a vested and absolute interest in one third. On the death of Mrs. Kilmer without issue, the capital of her fourth part vested in like manner, absolutely in the two survivors, William and Rachel. The income which accrued on her fourth part, during her life, belongs to Kilmer as her administrator. Beyond that, he has no claim upon that portion of the fund.

His claim for his wife's third part of Martin Colehammer's share, cannot be litigated here. That share is not now in controversy, and there is no issue or evidence, upon which it can be determined with propriety.

This reminds me of the point, that the surviving grandchildren, having received in their shares, the full benefit of the order

of sale, and one of them taken his fourth of the proceeds absolutely, without liability to refund; they cannot now claim to participate in the share of Mrs. Kilmer.

This is not a just conclusion, if the facts were precisely as they are stated in the point. The receipt of his share by William does not alter its character, or exonerate his representatives from accounting for it on his death without issue, in the life time of Rachel. If he should dissipate it, Rachel may be the loser in consequence of the order of sale and distribution, but Kilmer has no interest in the matter.

If Mrs. Kilmer's share had been paid to her guardian and invested on other security, the same principles would have been applied to it. It would have retained its character as real estate, held under devise, and her interest determinable.

The court's power of dealing with it for the support of the infant, does not affect the question.

The decree must declare the rights of the parties accordingly.

As the whole subject is peculiarly within the disposal of the court, I think provision should be made for the protection of the purchasers who executed the mortgage, against any doubt as to their having acquired the whole estate in the lands sold. The proceedings show clearly, that the court aimed to vest them with the whole title.

The decree may provide that William Colehammer before receiving any part of the fund, shall release and convey to the mortgagors, or to the purchaser at the sale under the decree, all the title he may have acquired to the premises, by the death of Martin and Mrs. Kilmer, with a covenant for a similar release in case he survives Rachel, and she shall die without issue. And the capital of Rachel's share in this mortgage, is to remain in court, and is not to be paid out to her, or her heirs or representatives, except on the execution of a similar conveyance.

With these provisions, the usual decree may be entered. A master's report as to the necessity of selling the whole property together, is requisite, unless the parties agree upon a mode of sale; and the cause must be heard on such report, prior to directing the sale.

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SAGORY, Receiver, &c. v. DUBOIS.

THE act to authorize the business of banking, passed in 1838, enabled any number of persons to associate and establish banks of discount, deposit and circulation, on the terms therein prescribed. The capital was not to be less than \$100,000. The associates were to seal and file a certificate, specifying among other things, the amount of the capital stock, and the number of shares into which it was divided, and the names, residence and number of shares held by the associates respectively. The shareholders, unless by express stipulation in their articles, were not to be individually liable for the debts of the association.

A banking company was organized under this law, by articles of association, which declared that the capital stock should be a million of dollars, divided into ten thousand shares of \$100 each, but business might be commenced, as soon as \$100,000 were subscribed for and paid. If any shareholder should omit to pay any instalment on his shares, pursuant to any call of the directors, the articles provided that his shares should be forfeited to the use of the association, together with all previous payments made thereon. And the shareholders were not to be personally liable for the debts of the association. The original associates, of whom D. was one, signed four thousand eight hundred and thirty-five shares, on which over \$100,000 was paid in, and the bank commenced business. All the associates signed a paper attached to the certificate or articles of association, by which they subscribed for and agreed to take the number of shares set opposite their respective names, as shareholders in the bank, and mutually bound themselves to fulfil all the engagements contained in the articles. D. subscribed for twenty-five shares.

Held, 1. That he was liable to pay the whole amount of the stock which he subscribed; 2. That the authority to forfeit the stock for the non-payment of called instalments, was a cumulative remedy, and did not affect the direct liability by force of the subscription.

The statute and his subscription, imposed upon him the duty of paying for his stock, which is recognized by the language of the articles of association, and from which the law implies an undertaking to make such payment.

The general banking law intended to provide for the payment, (or securing to be paid,) of an actual, substantial capital, to the extent defined in the articles of association, as the foundation of the operations of the banks thereby authorized. This was the declared policy of the act, and it was imperatively demanded for the public security, in respect of the important privileges and franchises conferred on those associations.

The terms "subscribe for" and "agree to take," in instruments of subscription for shares in a bank or corporation, considered.

A banking association made several calls upon its stockholders for payment on their shares. It declared dividends on the stock paid in, and applied the same to meet some of such calls, the last of which dividends was unauthorized by the situation of the company, and was contrary to the general banking law. After

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the calls on the shares amounted to half their nominal amount, the directors resolved that no further calls should ever be made, and forthwith discontinued the business of the company, which soon after became insolvent, and on the application of a creditor, the court of chancery appointed a receiver of its property and effects. On a bill filed by the receiver, to compel a stockholder to pay the balance of the nominal amount of his shares ;

- Held,** 1. That the defendant, having become liable by his subscription to pay up his shares in full, as called for by the directors, might be compelled to pay the same by the receiver who represents the creditors of the company, although there was no resolution of the directors requiring such payment.
2. The resolution that no further calls should be made, was void as to the receiver.
 3. The unauthorized dividend was not a valid payment upon the defendant's shares, and the amount of the same still remained due and payable.
 4. The receiver was authorized to proceed in equity, to compel the payment of the balance due on the shares.
 5. The other shareholders were not necessary parties to the suit.
 6. The defendant cannot in such suit, question the regularity or propriety of the receiver's appointment.
 7. The receiver is entitled to recover interest, from the date fixed by him in his advertisement, for the payment of demands due to the company.

Nov. 7, 8 ; Dec. 3 and 5, 1845 ; March 27, 1846.

THE bill in this cause was filed, October 1, 1844, by Charles Sagory, as receiver of The New York Banking Company, against Cornelius Dubois, Jr., a stockholder in the company, to compel him to pay up the unpaid balance on the shares of capital stock owned by him. The facts established by the pleadings and proofs, were as follows :

The defendant, with John Delafield and six others, on the tenth of October, 1838, formed an association under the *Act to authorize the business of banking*, passed April 18th, 1838, which was called The New York Banking Company. Articles of Association, pursuant to the act, were drawn up and signed and sealed by the eight associates, which were recorded in the clerk's office of the city and county of New York, and filed in the office of the secretary of state, on the 3d of November, 1838. By those Articles, the bank was located in the city of New York, its capital was declared to be one million of dollars, divided into ten thousand shares of one hundred dollars each ; and provision was made for increasing the capital to twenty millions of dollars. Seven directors were named in the Articles, of whom the defendant was one. They were to hold their offices for the term

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of six years, and were to have the entire government and management of the property and affairs of the association. If any shareholder omitted to pay the instalments on his stock, as called for by the board of directors, his shares should be forfeited to the use of the association. The association was to commence business, as soon as one hundred thousand dollars of its capital stock should be subscribed for and paid. By the twelfth article, no shareholder of the association, was to be liable in his individual capacity, for any contract, debt, engagement or transaction of the association, or any of its officers or agents.

To the Articles of Association, there was annexed a subscription or agreement, which was signed by the respective associates, together with their residences, and the number of shares of the capital stock taken by each. The agreement was in these words:

"We, the undersigned, do hereby subscribe for and agree to take the number of shares set opposite to our respective names, as shareholders of The New York Banking Company, having paid an instalment on the same, at the time of subscribing, of five dollars on each share, and we do bind ourselves and assigns to fulfil all the covenants and engagements contained in the articles of association, dated the tenth day of October, one thousand eight hundred and thirty-eight."

"NEW YORK. | Cornelius Dubois, Jr., twenty-five shares. | 25."

This paper was executed by the defendant in the manner appearing above, and by the other associates in a similar manner; the whole number of shares subscribed, being 4835. The agreement was recorded and filed with the Articles of Association.

The requisite amount, \$100,000, was paid in by shareholders in the winter after the organization of the company, and it proceeded to open an office of discount, deposit and circulation, and transacted the business of banking, in the city of New York. On the 8th of January, 1839, Mr. Delafield was elected president of the company. On the 23d of January, 1839, the directors made a call of five dollars on a share, payable on the 4th of February then next; and they resolved that shareholders should be permitted to make advances upon their unpaid stock, and to

pay up the same in full, at their option. Six other instalments were called for by the board, payable at different periods, up to November 8th, 1840, amounting in the aggregate, with the previous call and the sum paid on subscribing, to fifty per cent. of the nominal amount of the stock subscribed. Three dividends on the capital paid in, were declared, payable coterminously with the sixth, seventh and eighth instalments, viz.: one of four per cent., payable October 15, 1839; one of three and one-half per cent., payable April 20, 1840; and one of the like amount, payable November 1, 1840; each of which dividends were credited as payments on the calls then made payable. Previous to July, 1839, there had been subscribed by several persons, 2828 shares of the capital stock, in addition to those originally taken; and on the first day of July, 1839, the directors by a resolution, allotted to their assistant cashier, N. Dyett, in trust for the association, the balance of the stock not subscribed for, and he accordingly subscribed as trustee for such balance, being 2337 shares. No payment was ever made on account of this stock. In respect of the stock subscribed by the associates and others, 1983 shares were paid up, so as to become full stock, and on other shares the calls were paid as they fell due, the dividends being applied as before stated. On many other shares, but few of the calls were paid, and on some no payments were ever made. Mr. Dubois paid all the calls on his shares, so that, including the dividends, he had paid half the nominal amount of his subscription.

From July to November, 1839, the company became indebted to Edward Boisgerard in the sum of \$150,000, of which the greater portion remains unpaid; and in November and December, 1839, the company became indebted to The Farmers Loan and Trust Company, in several thousand dollars, which debt is still due. In connection with the advances made by Boisgerard to the company, it entered into a contract to the amount of several hundred thousand dollars, with the Hernando Rail Road and Banking Company, of the state of Mississippi, and advanced large sums to the latter. The Hernando Company failed to perform its engagements, and ultimately became insolvent, being the debtor of the New York Banking Company, to more than one hundred thousand dollars. This and other losses, compelled

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the latter to suspend its banking business; which was done by a resolution on the 14th of September, 1841; and reduced it to an insolvent condition. The Hernando Company's first default, occurred in the fall of 1839, and was known to the president in or before December of that year. Its full delinquency, was known and reported to the board of directors, before the dividend was declared in April, 1840; and before the dividend payable November 1, 1840, was declared, it was apparent from the state of the affairs of the New York Banking Company, that it had no profits to divide, and was threatened with the loss of a considerable part of its capital. The defendant was an active director, attending nearly all the meetings of the board; but the affairs of the company were managed by the president almost exclusively.

The company in January, 1842, neglected to make out and transmit to the bank commissioners, and to file in the secretary's office, the statement of its affairs, required by the act of May 26, 1841, to amend the act entitled an act to authorize the business of banking. On the 1st day of March, 1842, Boisgerard filed a bill before the Vice-Chancellor, against Delafield, president of the New York Banking Company, setting forth the indebtedness of the company to him, its insolvency, and its omission to comply with the last mentioned statute, and praying for an injunction against the company's further disposal of its effects, and the appointment of a receiver, and that the assets of the company might be applied to the payment of its debts. An order for an injunction and receiver, was made in that suit by the Vice-Chancellor, on the 28th of April, 1842, and a receiver was appointed, who died in June, 1843. In July, 1843, the complainant was duly appointed receiver of the effects of the New York Banking Company, pursuant to the foregoing order and one subsequently made in Boisgerard's suit by the Vice-Chancellor. A formal transfer of all the property of the company, was made to him as receiver, on the 22d of September, 1843.

The Farmers Loan and Trust Company recovered a judgment against the New York Banking Company, in January, 1843, on which an execution was issued and returned unsatisfied; and on the 18th of August, 1843, on the petition of the former com-

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pany, setting forth those facts, the Chancellor made an order for an injunction against the New York Banking Company, pursuant to the revised statutes, and appointing the complainant receiver of its property and effects.

The complainant, as receiver, pursuant to the statute, advertised for all persons indebted to the company, to pay the same by the 15th of January, 1844.

On the 14th of June, 1844, a final decree was made by the Assistant Vice-Chancellor, in Boisgerard's suit against the company, (see the report of the case in 2 Sand. Ch. R. 23;) by which he was declared to be a creditor of the company, that the company was insolvent, and in other respects was liable to be proceeded against for a dissolution, and by which the company was dissolved except as to the collection of its demands, and the receiver was directed to distribute its assets among its creditors. Under this decree, a master of the court reported that there was \$85,434 63, due from the company to Boisgerard. The decree in that suit was enrolled; the company nevertheless took an appeal from it to the chancellor, which was pending when this suit was heard.

The bill averred, that in order to pay the debts of the company, it would require the solvent stockholders to pay the full amount of the unpaid balance on their shares, and insisted that the stockholders were liable to make such payment. It was proved that the assets of the company were utterly insufficient to pay the debts. On the other hand, it appeared that the board of directors, on the 14th of September, 1841, passed a resolution, that from and after that date, no instalment beyond the fifty per cent. then paid in, should be called for on the capital stock of the company. And the defendant in his answer, insisted not only that this resolution was valid, and exonerated him from further payment on his stock; but also that his subscription to the capital stock, never made him personally liable to pay any sum thereon, unless he elected to do so; and the only remedy against him for non-payment of calls regularly made, was the forfeiture of his shares.

His answer set up various grounds of defence, preliminary to the question of his liability, which are adverted to in the opinion

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of the court: That the statements of the affairs of the company, exhibited to the directors by the officers, at the time of the declaring the respective dividends, showed that the company then had surplus profits beyond the amount of such dividends, and that the defendant believed those statements to be correct, and acted in entire good faith, in assenting to the dividends: And he insisted that the dividends were in fact warranted by the situation of the company, and that the company never was so far insolvent, as to be unable ultimately to pay its debts. The answer also insisted that the act of May 26, 1841, was not binding upon the company; that all the shareholders were necessary parties to the suit, and that the complainant had an ample remedy at law.

C. B. Moore, for the complainant.

I. By the 27th section of the general banking law of 1838, and the 1st, 2d, and 3d sections of the amended law of 1841, (see Laws of 1841, p. 357, 360,) any association neglecting to make out and transmit the statement required by the act, or violating any of its provisions, might be proceeded against and dissolved, in the same manner as any moneyed corporation.

II. The associations organized under the act, are substantially to be regarded as corporations, and all remedies applicable to corporations, at least in proceedings to enforce civil remedies against them, should be applied to these associations. (See 3 Hill, R. 319, 389, and cases cited.) This was decided by the vice-chancellor, the assistant vice-chancellor, and by the chancellor, (on appeal from the order appointing receiver,) in Boisgerard's suit.

III. The complainant has been appointed receiver, with all the powers of receivers of corporations, not only at the suit of Boisgerard, under the 38th and 39th sections of the Rev. Statutes, (2 R. S. 220 2 Ed. p. 378, 379,) upon proof that the New York Banking Company had not made the statement required by the general banking law, and had violated the provisions of that law; but also at the suit of the Farmers Loan and Trust Company, under the 36 and 37th sections of the Revised Statutes, (2 R. S.

378.) The complainant had all the powers defined in the 42d section, (2 R. S. 379,) by which it is his duty "if there shall be any sum remaining due upon any share of stock subscribed, to proceed and recover the same," and for that purpose to file his bill, &c.

IV. In both these forms of proceeding, the complainant is to divide the property collected by him, among the fair and honest creditors of the association. (See 2 R. S. 378, § 37; 380 § 48; 385, § 79, 80, 82.) He is to pass upon the validity of debts and claims against the association, (2 R. S. 384, § 72, 73, 74; 1 R. S. 799, sub. 8 of § 7, p. 108, § 19.) His proceedings are subject to the direction of the court, but no debtor nor stockholder sued for arrears, can bring into such suit, enquiries about the validity of particular debts or claims against the association. *Mann v. Pentz*, before Assistant Vice-Chancellor.

V. The defendant is responsible under these proceedings, for the balance remaining unpaid upon his subscription of stock.

(a) The agreement to take the shares, is an agreement to pay for them and the law contemplates the actual payment in full of the shares first subscribed.

(b) The provision for a forfeiture of shares, is merely a cumulative remedy. (21 Wendell, 273; 2 Hill, 127.)

VI. The resolution of the directors, the defendant being one of them, passed after the debts had been incurred, not to call for more payments of stock, was wholly nugatory. The defendant was present and aided on that occasion. Without him there would not have been a quorum of the board.

VII. The objection that the association is not a corporation, nor subject to the laws respecting corporations, while it is admitted to have acted under the general banking law; is untenable. The same relief ought to be given, even if the general regulations respecting corporations are not obligatory.

VIII. The Boisgerard claim, established in a suit against the president of the association, (which course the act authorizes;) is not to be tried again in this suit. But the defendant has not succeeded in impeaching the validity of the claim, even if it could be enquired into in this proceeding. There are also various other

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debts, which of themselves call for the payment of the defendants stock

IX. The claim against the defendant, limited to the amount of stock subscribed by him, should be paid in full, as an asset of the bank for the payment of its debts; without waiting for the slow collection of other assets. *Mann v. Pentz*, decides this point.

X. The appeal alleged, is imperfectly proved, but if proved, was no stay of proceedings, and forms no excuse for a delay on the part of the complainant; much less a ground of defence.

XI. There would have been no propriety in joining other stockholders in this suit. The objection of a non-joinder is untenable.

XII. The defendant by his acts, is estopped from setting up that he is a mere partner. The objection of an adequate remedy at law is untenable.

XIII. The defendant must deduct the amount of the alleged dividends, from the amount of his alleged payments, or account for the dividends as capital improperly withdrawn.

(a) It was improper to make dividends before the stock was full. An omission to fill up and pay in capital subscribed, must be treated as a withdrawal of capital, under the 28th section of the act of 1838.

(b) The defendant having been himself a director, and his presence necessary to constitute even a quorum of four; he cannot set up due diligence in defence of a dividend actually unwarranted.

(c) One dividend at least was irregularly declared.

(d) The whole were improvident, and their obvious connection with the calls of stock, and the attending circumstances, show that they were not made with that entire good faith which is indispensable to sustain them. They were based on anticipated profits, and on discounts credited to profit and loss before they were earned.

XIV. There should be a decree that the defendant is liable to pay the amount of his subscription, with interest from the 15th of January, 1844, and costs; and a reference to a master to compute the amount due, giving credit for the actual payments in pursuance of the calls, less the amounts of the dividends.

E. S. Van Winkle, for the defendant.

I. The liability of the defendant (if any) in this suit, must grow out of the articles of association, or the subscription for stock, or both. There is no common law liability. He came in under the act of 1838, supposing that he was to be subjected to its provisions only, relying on that hypothesis. The sections of that act, from the 15th to the 17th, the 22d and the 23d, and the 25th to the 28th, show that no such liability as that claimed in this suit, was ever contemplated. The history of the times when it was enacted, may be referred to, if the statute itself does not show its own exposition. (3 Howard's U. S. Rep. 1.) Its history will show that the legislature never intended that these associations should be considered as corporations, but as large partnerships.

II. By the subscription, the defendant subscribed for and agreed to take twenty-five shares, and bound himself and assigns, to fulfil all the covenants and engagements contained in the articles of association. He did take such number of shares, according to the true intent, and meaning of the articles, and has fulfilled all the covenants and engagements therein contained. He paid all the calls that were made on his stock, and the board of directors in whom the control was vested, adopted a valid resolution that no further calls should be made.

III. The articles provide in sect. 2, that the shares shall be \$100, each; and in article 6, that in case "any shareholders shall omit to make payment pursuant to any call of the directors for any instalment or instalments due on the stock standing in the name of such shareholder, or omit to fulfil any of the covenants or agreements of this contract, the shares held by such stockholder shall be forfeited to the use of the association, together with all previous payments made thereon." That is the only penalty and remedy provided, or that was in the contemplation of the parties.

IV. The articles further provided in article 12, that no shareholder of this association shall be liable in his individual capacity, for any contract, debt, engagement or transaction of this association, or any of its officers. The act of the legislature commonly called the "Free Banking Law," under which this association was organized, contains a similar provision in its 23d sec.

tion. (Laws of 1838, p. 245.) This bill therefore, seeking to render this defendant liable in his individual capacity, for the debts and engagements of the company, cannot be sustained.

There is a great distinction between corporations and these associations. Every creditor of the latter, by the articles of association filed and recorded, has notice in law, of all the conditions under which they exist. It is thus like a limited partnership. (10 Paige, 261.) Dealers with the association therefore, are not deceived. Our agreement was to pay all such instalments as should be called for, and if we did not, to forfeit our shares and the previous payments. Any stockholder had a right to stop, on forfeiting what he had paid.

This is a new act, introducing a new system, and intending to effect a change. The act itself declared there should be no personal liability; yet this suit is brought to charge the defendant with the debts of the association. Our agreement is expressed in the act, and the articles, which are to be taken together, and was upon the condition that we might forfeit, if we chose. (Angell and Ames on Corp. 419, 420, 428.) In the cases under the general manufacturing law, and kindred acts, there was something more than is contained in this agreement. In some, notes were given; in others, an express promise to pay, as in 21 Wend. 296, one of the most recent.

V. This is not a question whether there is a cumulative remedy by suit, on the articles of agreement, in addition to a forfeiture of the stock, but a case in which there has not been any forfeiture incurred, and no agreement to pay beyond the call for instalments. The defendant has paid all those calls, and that is all he pledged himself to do. The general laws of the state are not applicable. If they are, § 23 of the banking law was unnecessary.

VI. The New York Banking Company was an association formed under and in sole reference to the act entitled "an act to authorize the business of Banking," passed the 18th day of April, 1838; and the same was regulated and to be governed by the provisions of that act, and the acts amendatory thereof, and was not subject to or to be governed by the general laws of the state in regard to corporations, or moneyed corporations; or to

any other statutes of this state, except such as were therein mentioned and referred to. (See articles of association.)

All decisions of our courts declaring these associations to be subject to the rules and liabilities of moneyed corporations under the Revised Statutes, are adverse to the laws of this state. (1 Hill, 616; 25 Wend. 472; 1 Rev. St. 602, § 11, 25, 26; 2 R. S. 462, § 33, 34; Act of May 14, 1840, § 11.)

VII. But if the association is a corporation, within the meaning of the constitution of this state; and as such subject to the general laws of this state relative to corporations or moneyed corporations; then the complainant cannot maintain this suit, because the act of April 18, 1838, was not passed by the assent of two thirds of the members elected to each branch of the legislature which passed the same, and is consequently unconstitutional and void. If the court has any doubt whether an act was so passed by two thirds, it must inspect the record.

VIII. If the law then be unconstitutional and void, the defendant is not bound to make good his subscription. Boisgerard has no claim on the defendant as a sole party: the only responsibility of the defendant, (if any,) is a joint one with his associates, and this bill must be dismissed for want of proper parties. The contract of Boisgerard with John Delafield, cannot be enforced against the defendant. The defendant is only liable (if at all,) as a partner and associate, and the full stockholders are equally liable as well as defendant. The receivership is a nullity and illegality.

IX. Boisgerard, under whose bill the receiver was appointed, had no legal claim against the company.

X. The decree obtained by Boisgerard against John Delafield president of the New York Banking Company, and by the Farmers Loan and Trust Company, are not in any way or to any extent binding or obligatory upon the defendant, as determining either the existence or extent of any claim of Boisgerard, or the Farmers Loan Company upon the association; but this defendant is at liberty to contest the same. He never in person or by delegation, has had any opportunity to contest those claims. (2 Paige, 451.)

XI. If such decrees or either are binding and obligatory on the

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New York Banking Company as an association, and upon all the rights of this defendant as a stockholder, therein, so as to deprive him of all right to contest those claimants' right to be paid out of the assets of the company; yet they are to no greater extent binding on this defendant, especially when the complainant seeks thereunder to render this defendant individually liable and to contribute to debts not claimed by those creditors in their suits except as against the association, and in respect to which claims so made, this defendant has never had an opportunity of being heard, or of producing his proofs, or of having a trial by jury. The act allowing suits in chancery on these liabilities, is unconstitutional in denying that right. (Const. Art. 7, § 2, 7.) Here our property is sought to be taken without due process of law. (Const. of U. S., Amendments.)

XII. But if the defendant is not allowed in this suit, to dispute the claim of Boisgerard against the New York Banking Company, on the ground that it is *res adjudicata*, and cannot question the right of complainant to act as receiver, on the same ground, and is liable to respond for an amount, sufficient to make his shares full stock, in a suit against him personally, and that by virtue of his agreement to take twenty-five shares of stock; then the complainant's bill must be dismissed, as he has a full remedy at law against the defendant. (2 R. S. 469, § 69.) The statute means to give a remedy in equity, when there is none at law; not to subvert the established principle, that legal actions are to be pursued at law.

XIII. Even if the defendant is liable in any way or to any extent, or to any person whatever, for any deficiency on the shares subscribed for by him, in order to make them full shares, it is not competent for the complainant, as such alleged receiver or otherwise, to enforce such liability; and that the complainant in and by his bill has not stated such a case as authorizes him to file the same, or entitles him to the aid and interposition of this court. The complainant should at least have had the authority or direction of this court, to file the bill. (2 R. S. 461, § 33 to 35, 43 to 49.)

XIV. The scope and object of the bill of complaint in this cause, render it incompetent for the complainant to exhibit his

bill against this defendant singly ; but all the stockholders or alleged stockholders should and ought to be united together as defendants in one bill of complaint, to the end that the responsibility, (if any,) might be apportioned among, and a just and equitable contribution enforced between them ; which cannot be done when separate suits are brought against each stockholder. This proceeding leads to circuitry of action, and a series of bills to enforce contribution against other parties. The general rule of equity is against such a course.

C. O'Connor, for the defendant.

FIRST. The preliminary point, as to the jurisdiction of the court. (The counsel referred to 2 R. S. 469, § 67 to 69 ; the usury act of 1837, Laws of 1837, p. 487, and the decisions under it in 3 Edw. Ch. R. 444, and 7 Paige, 602 ; the act giving a remedy to remaindermen &c., and cases under it, 1 Rev. Laws, 527, § 33, 11 Johns. 429, and 13 Johns. 263 ; also to 2 R. S. 464 § 44 to 50, and 20 Johns. 669.)

SECOND. Did the defendant bind himself to pay up these shares of stock ? The leading case, and the one on which the complainant relies, is *The Hartford and New Haven R. R. Co. v. Kennedy*, (12 Conn. R. 499.) Angell and Ames give the doctrine that a subscription to stock, where the party, expressly in terms, or by fair and necessary implication, agrees to take the whole amount of the stock and to pay for it ; is binding and may be enforced. But where it is neither express, nor fairly to be implied, then no recovery can be had against him, and he is at liberty to renounce or abandon the undertaking, whenever he sees fit. The question generally arises when there is a provision for a forfeiture. This furnishes a cumulative remedy, whenever there is a promise to pay either express or implied ; but when there is neither, it constitutes a term of the contract, on which he may renounce the undertaking.

In the case in 12 Coun., Huntington, Justice, examines the question in a very elaborate opinion, one of exceeding, nay, amazing ability ; and he holds that the only difference is between an express and implied promise. There was really no difficulty in the *R. R. Co. v. Kennedy*. The thirteenth section of the R. R.

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charter, provided that the corporation *might require payment* of its stockholders. Here there is no mode of inferring a promise to pay, except from the clause of forfeiture itself. The strongest words in this subscription are, "agree to take the number of shares." If there had been no clause of forfeiture, perhaps the agreement to pay might have been implied. Now, the sixth Article, which is the only remaining ground, contains no power to the directors to make calls, or expressly requiring payment. It contains the remedy of exclusion, referring to the omission to pay, but there is no obligation attached. Thus it is brought within the distinction taken in the 12 Conn. R. In the next case, decided in 12 Conn. R. 530, the same corporation v. *Boorman*, it was held that the defendant by accepting an assignment of the shares, became a stockholder, and thus liable. In all the adjudged cases, there has been either an express promise, or a direct legal liability to pay.

Judge Huntington in the case of *Kennedy*, relied on the following authorities: 1 *Caines*, 380, in which there was an express promise to pay; 14 *Wend.* 20, where by the charter, shareholders were made liable for the debts of the company; 2 *Greenleaf*, 404, and 576, in one of which the statute declared the party should pay, and in the other that the shares should be paid as called in; 6 *Harr. & Johns.* 394, and 1 *Halsted*, 365, which were suits to recover assessments authorized by law to be imposed and collected; and 6 *Harr. & J.* 128, where the original stockholders were liable, and the defendant, an assignee, assumed the liability.

The cases cited by the counsel in 12 Conn., are no better, to sustain the complainant. In 5 *Mass.* 83, there was an express promise in writing; and so in 9 *Johns.* 217, and 14 *Johns.* 239. One of the cases cited, refers to 16 *Mass.* 102, where the corporation failed to recover assessments, but did recover on an express promise.

As to 21 *Wend.* 274, the *Herkimer Manufacturing Co.* case, there was an express promise, and the charter also imposed a liability; and 21 *Wend.* 296, the case of the *Troy Turnpike Co.*, there was a positive agreement to pay, on pain of forfeiture of the shares. The latter is always regarded as a penalty, and the agreement to pay is therefore held binding, and the forfeiture

does not take away any right or remedy. The Troy Turnpike case is thus directly in favor of the rule for which we contend, and accords with the principle of the Massachusetts decisions and with the treatise of Angell and Ames.

It will be said, that although there is no act of incorporation, the Articles of Association are equivalent. This is correct under the decisions, and the Act of 1838, must itself apply, permitting the Articles to regulate as to the amount of the capital stock to which the association was limited, and the amount which must be paid, and the like. There is no clause in the act other than this permissive section, to eke out an implied promise to pay; and there is none in any other statute. Now here, the Articles declare that the capital stock *shall be* \$100,000, and *may be* a million. If it be said, that section 69 of 2 R. S. 469, applies, I answer, it gives no new right of action. It merely confers a remedy, where a right already existed. The statutes relative to corporations generally, or to insolvent corporations, do not apply to these associations, unless where such statutes are referred to in the general banking law or the amendatory acts. The legislature, (as it has been decided,) by that law created *corporations*, but required that they should be known as *associations*, and not as that thing which in general legislation was called a corporation. So in the amendatory acts, the legislature contra-distinguished corporations from these associations, and thus they show that the provisions of law applying to the former are not to apply to the latter. The legislature has the power to declare how its language shall be understood, and in effect enacted that the laws relative to corporations should not apply to these associations, although they are in fact bodies corporate; that they are not to be deemed corporations in the legislative sense. Thus laws have twice been enacted, prescribing the forms of the returns to be filed by the banking associations; although the existing laws relative to chartered banks prescribed those forms. And various provisions relative to monied incorporations, have by statute been made expressly applicable to these associations. *Expressio unius est exclusio alterius*. (See Laws of 1839, p. 328; 1840, p. 154; 1841, p. 33, 106, 168, 308.) Therefore we must look to the common-law, the general banking law, and the articles of

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association, for the liability of the shareholders ; and not to the revised statutes, or any other source. And referring to those standards, the defendant in this case had the right to go on and pay, or to withdraw from the company, and forfeit what he had paid.

F. B. Cutting, in reply.

FIRST. As to the complainant's right to institute this suit. (The counsel referred to § 27 of the general banking law ; 2 R. S. 463, §§ 39, 41, 42, and § 67 to 69 ; 2 R. S. 42 ; *Mann v. Pentz*, before the Assist. Vice-Ch. ; 9 Paige, 160 ; and 7 Term Rep. 37.)

SECOND. Is the defendant liable for the balance of the twenty-five shares which he subscribed ? The terms of the subscription, with the articles of association and the banking law itself, import a promise to pay the shares.

The object of the banking law, was to create institutions for loaning money, and of course with monied capitals. The certificates were to be filed, in order to show the amount of such capital, and the responsibility of those who were to pay.

Those who took shares by transfer, were to "succeed to all the liabilities of prior shareholders." (§ 19.) What were those liabilities ? There was to be no personal individual liability to creditors. There was nothing upon which the clause could operate, except the payment for shares subscribed. The provisions as to dividends and new subscriptions, point to the same conclusion. The subscription was not a nominal act. The object of the associates, *inter sese*, was to raise the proposed capital, by a subscription or a sale of shares. They engaged that the capital should be a million, and each so engaged to the extent of the shares he subscribed. Each undertook that such shares should go to make up the requisite amount. The sixth article shows it was their intention that the stock signed, should be "*paid in*." The "par value" is referred to ; that is, the sum contributed in that mode. So when the language is used, "until subscribed and paid for, or secured to be paid," &c. If it be said that this is limited to the nineteen millions of capital beyond the first million ; I answer, if it were so designed, the intention would have been expressed. The first million is included in the twenty.

So the provision to forfeit for neglect of payment, implies a duty to pay. There can be no neglect, unless there be a duty. So as to the clause, when an instalment becomes due, &c.; it is not *due*, unless the party is bound to pay it. Like a paper signed, which says "Due A. B.," &c., or "I. O. U.," the law enforces each as a promise. The leading case referred to, 12 Conn. at p. 509, shows that no precise words are necessary to make such a promise.

Now the paper itself, which the defendant signed. He *agreed* to take, and he *did* take, twenty-five shares; and the question is, whether he can *take* the shares and not *pay* for them. He took the shares and the dividends. I agree to take your house for a year, and go into possession. Can I at the end of the year, set up that there was no agreement to pay rent? So I go into a shop and say, I will take certain goods. To "*subscribe for*," is to promise a stipulated sum for the promotion of a specified undertaking. (Johns. & Walk. Dict.) So the word "*take*," means to receive, to accept, to purchase. Here it imports paying up the stock. Suppose a subscription for a book to be published in twenty volumes. I subscribe, saying I will *take* the work, and after receiving one volume, refuse the rest. So of an enterprise to build a steamship, or the like.

Any other interpretation of this subscription, would be a fraud upon creditors; especially after filing the articles of association. The cotemporary exposition of the subscription by the defendant and the other parties, corresponds with this construction. The directors made *calls* for payments, which it is now said they had no right to enforce. So they finally resolved that no more calls should be made; and mean time, allowed stockholders to pay in advance of the calls.

They agreed that the capital *should be* a real capital of a million. An engagement to pay for shares received, to the extent of \$100 a share, whenever required by the directors, is equivalent to a purchase of the shares. If the defendant had only put his name to an instrument, saying "I become a member of a company," expressing its capital, &c., he would have been liable to pay. (1 R. L. 600, § 5; 3 Rev. Stat. 531, 2d ed.)

In 2 Beav. 560, the Herkimer Manufacturing Co. 21 Wend,

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273, and the Troy Turnpike Co., 21 Wend. 296; there was nothing stronger than there is in our case; and the parties were held liable.

There is no such distinction, as is urged on the other side, between *allowing the corporation to forfeit*, and providing that the shareholders shall pay "*on pain of forfeiture*."

The Hartford and New Haven R. R. Co. v. Kennedy, (12 Conn. 499,) is directly in point. It is a very able and elaborate case, and the court there examines the Massachusetts decisions, which are the only authorities that ever threw any doubt on the question. In 12 Conn. 530, the same decision was made against an assignee. Similar authorities, are 6 Harr. & Johns. 128; 2 Greenleaf, 404; 2 Bibb. 576; 7 T. R. 36, before cited; 2 Price's R. 93; and 14 Johns. 238. In the latter, there was an express promise. In 10 Johns. 217, the defendant, sued on a church subscription, was held not liable, there being nothing from which to infer a promise. In 14 Wend. 20, the doctrine was taken for granted by the court. That the authority to forfeit and sell the stock for non-payment, was merely cumulative, I refer to 9 Johns. 217; 21 Wend. 273, and 296, before cited; 2 Hill, 127, and 12 Conn. 529, and the authorities there cited.

As to the resolution of September, 1841, against making more calls on the stock, which the defendant denominates a release; it is a release executed by the debtors themselves, in their own favor. It is sufficient to refer to *Nathan v. Whitlock*, (9 Paige, 152,) to show its invalidity.

THIRD. The defendant is bound to restore the dividends credited to him, or to pay the instalments on his shares which were thereby discharged. Those dividends were so much capital withdrawn from the company, and the burthen is on the defendant to show they were rightfully paid. 6 Paige, 486; 7 Paige, 201. (The counsel here commented upon the testimony relative to these dividends, and their impropriety and improvidence.) Until the stock was paid in full, defendant had no *shares*, properly speaking, and could not receive dividends. It is clear the intent was to contrive a mode to fill up the stock, without paying any thing. They had no right to divide probable earnings, nor any thing not actually earned. If the dividends were the result

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of error as to facts, and not of carelessness or fraud, still the defendant must refund them, with interest from the date of each.

The receiver is entitled to recover interest on the whole unpaid balance, and the latest period to which he can be limited, is the date specified in his notice to the debtors of the company. That notice was equivalent to a call by the directors.

THE ASSISTANT VICE-CHANCELLOR.—Several of the points presented on the part of the defendant, have been settled by various adjudications in our courts of law and equity. Thus, it is decided in the court of last resort, that the act to authorize the business of banking, usually called the *General Banking Law*, is constitutional, although on its passage it did not receive the assent of two-thirds of the members elected to each branch of the legislature. (*Warner v. N. A. Trust and Banking Co.*, 23 Wend. 103; *Farmers Bank of Hudson v. Livingston*, Dec. Term, 1845, not yet reported.)^(a)

It has also been decided in the same court, in the supreme court, and by the chancellor, as well as by the assistant vice-chancellor, that the associations organized in pursuance of the act, are *corporations*, and as such are liable to the provisions of law in respect of monied corporations, except where such provisions are inconsistent with the special legislation relative to these associations. Indeed this proposition was decided in the suit of *Boisgerard v. The New York Banking Company*, in which the complainant was appointed receiver, in both branches of this court in the first circuit, and by the chancellor on appeal from the order for a receiver.

That order, and the final decree in the suit of *Boisgerard*, decide two other questions, viz.: that *Boisgerard* was a creditor of the N. Y. Banking Company; and that the association had subjected itself to the proceeding which resulted in the appointment of a receiver. These are questions which are not open to inquiry in a suit against the defendant as a stockholder of the association.

(a) Now reported, 2 Denio, 380.

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All these points were presented, for ulterior purposes, and it is sufficient to notice them thus briefly.

The right of the receiver to bring this suit, under the provisions of the revised statutes relative to Proceedings against Corporations in Equity, is adjudged, so far as I am concerned, in the case of *Mann, Receiver of the Catskill and Canajoharie R. R. Co. v. Pentz*, January 6, 1845, not yet reported ;(a) in which case, I gave the subject a thorough consideration.

The same decision overrules the objection that the receiver's remedy to compel stockholders to fill up their stock, is at law and not in equity.

In this case no action at law could be maintained, for the reason that no calls had been made for the unpaid amount of stock.

As to the remedy being at law for legal causes of action, and in equity only when there is no legal remedy ; it may be answered, that the statute gives a new remedy for a new state of things, and expressly declares it may be pursued at law or in chancery.

It was said that the act was unconstitutional, as depriving the party sued in equity of the benefit of a jury trial. Without entering at large upon so grave a question, I think this defendant is not at liberty to urge such an objection. The legislature created new rights and privileges, and new remedies in respect of such rights, and the defendant voluntarily subjected himself to both. He cannot accept the franchises conferred, and repudiate the terms and conditions with which the legislature accompanied them.

It was also objected, that the receiver should have brought into the suit all the stockholders of the association, so that the court could enforce contribution as should be just.

The statute provides otherwise, in the 69th section of the title before mentioned. (2 R. S. 469, § 69.) A joint suit, in order to carry out the idea of contributions, would require all the claims against the corporation and all its assets to be adjusted, and

(a) See this case in 2 Sand. Ch. R. 257.

would, I apprehend, prove to be a very slow process for creditors.

These are all the formal or preliminary points, which it is necessary to notice, and I now come to the interesting question in the cause; is the defendant liable by reason of his subscription to the capital stock of this association, to pay to the receiver, the amount remaining unpaid on such stock, so as to make the same full stock?

The act to authorize the business of banking, (Laws of 1838, chapt. 260,) enabled any number of persons to associate and establish banks, and expressly conferred on the institutions organized under it, subject to the prescribed limitations, all the powers usually exercised by the banks previously incorporated in this state. They were authorized to discount bills, notes, and evidences of debt; to receive deposits; to issue bank notes for circulation; to buy and sell bullion, coin, and bills of exchange; to loan money on real and personal security, and to exercise all incidental powers necessary to carry on such business.

The 15th section of the act provided, that the aggregate amount of the capital stock of any such association, should not be less than \$100,000.

By the 16th section, the associates were required to make a certificate under their hands and seals, which should specify: "1. The name assumed to distinguish such association, and to be used in its dealings. 2. The place where the operations of discount and deposit of such association are to be carried on, designating the particular city, town or village. 3. The amount of the capital stock of such association, and the number of shares into which the same shall be divided. 4. The names and places of residence of the shareholders, and the number of shares held by each of them respectively. 5. The period at which such association shall commence and terminate." This certificate, was to be duly acknowledged or proved, and recorded in the clerk's office of the county where the association should be established, and a copy was to be filed in the office of the secretary of state.

The 19th section made the shares transferable, and imposed upon all who became shareholders by a transfer, the rights and liabilities of the prior holder of such shares. And no change

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should be made in the Articles of Association by which the rights, remedies, or security of existing creditors, should be weakened or impaired.

By the 20th section, every association by its original articles, might provide for an increase of its capital from time to time.

By section 26th, each association was required on the first Mondays of January and July in every year, to make and transmit to the comptroller, a statement upon oath, containing amongst other things,

“1. The amount of the capital stock paid in according to the provisions of this act, or secured to be paid.”

“8. The amount of the losses of the association ; specifying whether charged on its capital or profits, since its last preceding statement, and of its dividends declared and made during the same period.”

“11. The amount which the capital of the said association has been increased during the preceding six months, if there shall have been any increase of the said capital,” &c.

By the 28th section, “If any portion of the original capital of such association shall be withdrawn for any purpose whatsoever, whilst any debts of the association remain unsatisfied, no dividends or profits on the shares of the capital stock of the association, shall thereafter be made, until the deficit of capital shall have been made good, either by subscription of the shareholders, or out of the subsequently accruing profits of the association,” &c.

The Articles of Association of The New York Banking Company, provide that the capital stock of the association shall be one million of dollars, divided into ten thousand shares of \$100 each, and may be increased to twenty millions of dollars. By the sixth article, this increase might be made by the board of directors from time to time, either by subscription, or by a sale of the shares, until the twenty millions should be subscribed and paid for, or secured to be paid, as the directors might require. And “If any shareholder shall omit to make payment, pursuant to any call of the directors, for an instalment or instalments due on the stock standing in the name of such shareholder, or omit to fulfil any of the covenants and agreements of this contract, the shares held by such stockholder shall be forfeited to the use of

the association, together with all previous payments made thereon." Article 7th allowed the association to commence business, as soon as \$100,000 of its capital was subscribed for and paid. After the end of six years, shareholders owning one-fourth of the *capital paid*, might annually designate one director who should retire, and an election should then ensue to fill the vacancy. (Article 8th.)

The defendant signed and sealed the Articles of Association, and annexed to the same was an agreement of the same date, which all the associates signed, including the defendant, and which is in these words :

"We, the undersigned, do hereby subscribe for and agree to take the number of shares set opposite to our respective names, as shareholders of The New York Banking Company, having paid an instalment on the same, at the time of subscribing, of five dollars on each share, and we do bind ourselves and assigns, to fulfil all the covenants and engagements contained in the Articles of Association." The defendant set twenty-five shares opposite to his name, upon this instrument.

The Articles of Association and agreement appended, were proved and recorded in pursuance of the act, and a copy was filed in the secretary's office ; and the association commenced business as a banking company.

The defendant contends, that his obligation by his subscription, was merely to take the twenty-five shares, which he has done ; that he inturred no personal liability to pay for such shares ; and that the only remedy which the association had, for his omission to pay the calls upon his stock, was to forfeit it to the use of the association, under the sixth Article.

I think this is altogether too restricted a view of the effect of his subscription for this stock.

The provisions of the General Banking Law, to which I have referred, demonstrate that the legislature had no intention to create banks without actual capital. For more than thirty years previous to the passage of that act, the business of banking had been a privileged pursuit in this state, variously guarded by penal laws, and its exercise conferred only by special acts of

legislation. By the general banking law, it was designed to throw the business open to the public, so far as to dispense with special charters; but in no respect departing from the system of prescribing and defining its limits, and preventing frauds and abuses upon the community, which had so long been a marked feature in our legislation. Hence the various restrictions as to circulating notes, the capital stock, &c., which are contained in the act of 1838. No institution could organize under it, with a less capital than \$100,000. The privileges conferred, and the prior course of legislation show, that this was intended to be *actual capital*, and not nominal; a substantial reality, not a bubble. The exemption of stockholders from personal liability for the debts of the association, affords a further reason for the legislature's insisting upon a known and actual capital. The subsequent provisions confirm this view, so as to leave no room for a doubt. The certificate, which was to make known to the public the existence, sphere of operations, and resources of the bank, was to specify the amount of its capital stock, and the number of shares composing it, and by whom they were held. The capital stock might be increased from time to time, not by paying in upon the capital first subscribed and set forth in the certificate; but by an addition to such original capital; precisely as the Articles of the New York Banking Company prescribe. Then in the semi-annual statements which were to be filed with the comptroller, in order to keep the community informed of their progress and stability, each association was required to state the amount of its capital stock *paid in according to the provisions of the act, or secured to be paid*.

Now the act makes no provision in express terms, for the paying in of the capital. But the paying in or securing it, is a necessary consequence of the provisions, that the capital stock shall not be less than \$100,000, and that the amount of it shall be determined upon and specified, in the certificate upon which it becomes organized.

The semi-annual statement is to show the amount of its losses, and to specify whether they have been charged on its *capital* or profits. Here again is evidence that the word capital, throughout, means not a name, but a thing; not a nominal sum para-

ded to a credulous public, but a sum fixed by the organic articles, and actually paid or secured.

So of the 28th section of the act ; it does not admit of the possibility of a nominal capital. It treats of a withdrawal from a paid up capital, and designates the same as the *original capital*:

To test this proposition farther, I will suppose that the New York Banking company had set out with a capital of \$100,000, in shares of \$100 each ; so subscribed and so stated in its articles and filed certificate ; and the defendant had appeared, as he now does, a subscriber for twenty-five shares.

I will also suppose that the shareholders had paid in proportion, as they have in this case, and that the defendant had paid in cash and dividends, fifty per cent. on the amount of his stock. What kind of a return to the comptroller could this bank make ? Could the president or cashier, make oath that its capital was \$100,000, paid in, or *secured to be paid* ? Assuredly not. Only half is paid in ; and the other half is neither paid, or in any manner secured, on the defendant's view of his subscription.

Would not the return show on its face, that the bank had no legal existence, and that it was usurping the franchises intended to be granted by the act ?

These brief considerations, which might be much extended, and probably to the advantage of the argument, convince me that the capital stock fixed by these associations, and specified in their certificates, is an amount which the legislature required to be paid, or secured to be paid, as the foundation of the operations which the statute permitted to them. And that such payment or security, of the known and designated capital, was a part of the declared policy of the law, and was imperatively demanded for the public security. A different construction, would subject the community to the evils of a horde of showy but irresponsible institutions, which under the imposing title and provisions of this act, might swindle the credulous and the unwary, without restraint or redress.

Such being the character and intent of the law, what did the defendant undertake, when he subscribed these articles of association ? He thereby declared to the public and his colleagues, that he was one of a number of associates in this bank, that its capital should be a million of dollars, and that he had subscribed

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for and agreed to take twenty-five hundred dollars of such stock. He contracted, and made this declaration, in direct reference to the statute, and the statute itself thus became a part of his undertaking.

Is his agreement satisfied or fulfilled in any sense, by his simple signature to the articles and certificate? Is that a *taking of the shares*, within the meaning of the statute and articles.

It seems to me there can be no doubt upon these questions. When the defendant subscribed for and agreed to take this stock, he contracted to become a stockholder according to the banking law. He agreed to receive, and pay up or secure, \$2500, of the capital stock of this company. It was this undertaking, that he put forth to his associates and to the community; and he could scarcely have imagined that his subscription imposed no personal liability, unless he was willing to lend his name to a scheme which was more likely to prove dishonest and fraudulent, than to promote any honest purpose.

His subscription imposed upon him, by force of the act, the duty of paying for his stock, or securing it to be paid, and the duty is recognized by the language of the sixth article. The law implies an obligation from this duty, upon which an action may be maintained. The articles it is true, in effect require that calls should be made by the directors, and probably the association could not maintain an action at law, until such calls were regularly made; but that does not impair the remedy in behalf of the receiver. The provision for the forfeiture of the shares does not affect this construction. If that were the only remedy, the statute which is paramount to the articles, would be evaded and infringed. The law requires payment or security, upon such a subscription, and forfeiture of stock, is not a compliance with its requisition. It might result in payment, but such a result is never probable. The subscribers would pay, if the stock were worth purchasing.

Nor is the "capital stock," in this bank, to be deemed only \$100,000, within the meaning of that term in the banking law. The associates provided that they might commence business when \$100,000, was paid in; but at the same time, they agreed

with each other, and declared to the world, that the capital stock should be a million.

I am by no means satisfied that I ought not to hold the defendant liable to pay the full amount of his shares, upon the terms of his written contract, without reference to the statute. To "subscribe for" shares, in one of the ordinary significations of the word, *subscribe*, is to promise to give the thing subscribed for, or to contribute to the undertaking accordingly. In this case, it would be equivalent to a promise to contribute \$2500, towards the capital stock of the bank. So when he agreed to *take* twenty-five shares, what was this but an agreement to receive the shares, and get them into his possession, which could only be effected by paying for them. One who agrees to *take* a thing, which is the subject of price or compensation, *ex vi termini*, agrees to pay for such thing, the price attached, or what ever it is worth. But without resting upon the language of the defendant's subscription alone, my conclusion upon the articles, the subscription and the statute, is clear and unhesitating, that he was personally liable to pay the full amount of the capital stock which he subscribed.

It was insisted by the defendant, that the banking law, as well as the articles of Association, expressly exempted him from personal liability for the debts of the association. This is very true, but it does not apply to the case. This suit is brought to compel the defendant to pay his own debt to the association. It is not an attempt to subject him to the debts due from the company, any farther than it requires him to make good his subscription to the capital stock, on the faith of which the company acquired a corporate existence, and the power and credit to contract obligations.

I have thus considered the question upon principle, because the authorities in this state, were deemed by the defendant's counsel, inconclusive; and I believe the point has not been expressly decided, either in this court or the court for the correction of errors.

I will next recur to those authorities. The first case is that of the *Union Turnpike Company v. Jenkins*, (1 Caines R. 381.) The subscription contained an express promise to pay, and one

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contested question was, whether there was any consideration to support it. The court decided that the interest in the shares of stock acquired by subscribing, was a sufficient consideration to support the action. The charter required ten dollars on each share to be paid at the time of subscribing, and as it did not appear that the defendant had complied with this condition, Lewis, Chief Justice, dissented, on the ground that the defendant had not become a member of the company.

On the latter ground, the judgment was reversed in the court for the correction of errors, 1 Caines C. in E. 86. One senator pronounced an opinion for reversal, for this and the further reason that the charter authorized the company to forfeit the stock for non-payment of the calls. But the chancellor held the latter to be a cumulative remedy, and the decision has always been regarded by the courts, as proceeding on the other ground exclusively. (See *Goshen Turnpike Company v. Hurtin*, 9 Johns. 217, per Curiam; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 244, per Thompson, Ch. J.)

It is difficult to perceive wherein an express promise in these subscriptions, enhances the liability. The consideration which is requisite to sustain such a promise, is raised by inference of law, from the subscription itself and the privileges thereby conferred. From the same circumstances, will not the law infer a duty to pay for the stock, and an implied obligation of equal validity with an express promise? I think it will, in the usual forms of subscription, where there is nothing in the charter repugnant to such an inference; and many of the adjudications appear to sustain this principle.

In the *Goshen Turnpike* case, above cited, the decision was that an action lies against a stockholder, on a note given for shares, payable in instalments as the corporation should require. The court say that an action would lie for the instalments, on a subscription for the stock, promising to pay the amount.

In the *Highland Turnpike Company v. McKean*, (11 Johns. 98,) and the *Dutchess Cotton Manufactory v. Davis*, (14 *ibid.* 238,) the actions were maintained on the subscription, containing an express promise to pay.

The Harlaem Canal Company v. Seixas, and *v. Spear*, (2

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Hall's Rep. 504, 510,) in the New York Superior Court, are to the same effect. The cases were upon demurrer, and the promise averred in the declaration, might therefore be assumed to be express. In *Spear v. Crawford*, (14 Wend. 20,) which was an action against a stockholder of the Harlaem Canal Company, at the suit of a creditor, the defendant had done no act whatever as a stockholder, except to sign a paper, by which he agreed to take sixteen shares of the capital stock of the company; and the court held him to be liable. Judge Sutherland, delivering the judgment of the court says, "The promise of the defendant and the other subscribers, although it is in form, to take the shares subscribed by them respectively, is undoubtedly, (when taken in connection with what precedes it, and with the act of incorporation, which is there referred to and in part recited,) a promise not only to take the shares, but to pay for them, to take them upon the terms and conditions set forth in the subscription paper; and the corporation could, undoubtedly, in the appropriate form of action, and upon a declaration containing the necessary averments, have enforced payment of the subscription price of the shares, from the subscribers." In *The Herkimer Manufacturing and Hydraulic Company v. Small*, (21 Wend. 273,) and again before the supreme court in 2 Hill's R. 127, the court assume it to be the settled law, that a stockholder is liable by force of his mere subscription for the stock, without an express promise.

In *The Troy Turnpike and Rail Road Company v. McChesney*, (21 Wend. 296,) the promise of the subscribers to the stock was express, but it was to pay in the manner specified, *upon pain of forfeiting to the company all previous payments made thereon.*" The court decided that the company could recover on this subscription, and that it might be counted upon as an absolute promise.

These authorities go far to show that the settled law of this state is, that one who subscribes for shares, or agrees to take shares, in an incorporated company, thereby becomes liable to pay the amount of such shares to the company.

On another point presented in this case, they are perfectly decisive, viz. that the authority to forfeit the stock for the non payment of instalments, does not take away or impair the right of action against the stockholder upon his subscription, and that

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the remedy by forfeiture is cumulative. This was held in 1 Caines R. 381, and in several of the subsequent cases which I have cited. The *Herkimer Manufacturing Company* case, (21 Wend. 273,) went farther, and decided that an actual forfeiture of the shares did not preclude an action for the sum payable thereon, unless the value of the forfeited shares was equal to such sum. If the value were less, the company was entitled to recover the difference.

This subject has been much discussed in the courts of the different states. In Massachusetts, it is held that a subscriber is not liable upon his subscription for stock, unless he expressly agrees to pay. See the cases collected in Angell and Ames on Corporations, 419 to 426, 2d Ed.

In the *Worcester Turnpike Corporation v. Willard*, (5 Mass. 80,) the court nevertheless enforced an express promise to pay assessments on the shares, although there was a clause of forfeiture superadded. Similar in principle is the *Bear Camp River Company v. Woodman*, (2 Greenleaf, 404.)

The courts in New Hampshire and Maine, appear to have adopted the rule as established in Massachusetts.

In Vermont, it is held that an action of assumpsit, may be maintained upon the subscription, without an express promise, where the charter or by-laws provide no other remedy for the recovery of assessments. (*Essex Bridge Company v. Tuttle*, 2 Vermont R. 393.)

In the case of *Instone v. The Frankfort Bridge Company*, (2 Bibb, 576,) the action was assumpsit against a stockholder, counting upon a subscription for twenty shares, and a call by the directors. There was no express promise or provision for payment. The court of appeals in Kentucky, sustained the action, on the grounds which I have attempted to illustrate in this suit.

In that case, the charter contained a clause authorizing the directors to forfeit the stock for non-payment, and the directors had proceeded to order a sale of the defendant's shares, and had advertised them and offered them accordingly. Two shares were sold, and they could obtain no bid for the others. The court held that the forfeiture was a cumulative remedy, and did not interfere with the one by action.

The principle upon which this bill is maintained, was decided in *Dugan v. The Mayor &c. of Baltimore*, (1 Gill & Johns. 499.) The charter of the city of Baltimore authorized the laying of taxes, and the collection of the same by distress. It was adjudged that the corporation could maintain an action of assumpsit for a tax regularly imposed. In the previous case of *The Mayor &c. of Baltimore v. Howard*, (6 Harr. & Johns. 383, 394,) the same ground was taken by the court, but the decision was on another point, viz., that where a distress or action was authorized for the recovery of a tax, they were cumulative remedies. In *Bend v. The Susquehanna Bridge and Banking Company*, (6 Harr. & J. 128,) an action was maintained for instalments called on the stock, against the assignee of shares from an original subscriber. The court say that a subscription for the stock, or the taking a transfer, raises an assumpsit to pay all calls regularly made.

But the case which from its intrinsic merit and unanswerable argument, outweighs all the others, was decided in 1838, by the supreme court of errors in Connecticut, and it is precisely in point. I refer to the *Hartford and New Haven Rail Road Company v. Kennedy*, (12 Conn. R. 499.) The action was assumpsit to recover the assessments on ten shares of stock which Kennedy had subscribed for in that company. The subscription contained no promise. Its operative words were, "we do hereby subscribe to the stock of the said rail-road, the number of shares annexed our names respectively on the terms, conditions and limitations mentioned in the said resolution," (incorporating the company.) The 13th section of the charter provided that the directors might require payment of the sums subscribed to the capital stock, as they might deem fit, and in case any stockholder should refuse or neglect to make payment, his stock might be sold by the directors, after six months from the time when the payment became due. The court decided that from the relation of stockholder and company created by the charter and the subscription, a promise by the defendant, was implied to pay the instalments on the shares; and that the remedy given by a sale of the stock of delinquent shareholders, was cumulative merely, and left such promise in full force. The opinion of the court was delivered by

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Mr. Justice Huntington, with an ability and cogency of reasoning which has excited my highest admiration, and which it would be vain for me to attempt to imitate. It is in my judgment, unanswerable upon the great question involved, the force and effect of a subscription for shares in these stock corporations; and it is reposed upon the solid foundations of the end and design of the legislature, and the sense and meaning of the act of subscription.

The learned counsel for the defendant, argued that the rail road case differs from this, in the fact that there was an express authority in the charter, *to require payment* of the stock, while here no such power is given. This is true as to an express power, for the general banking law contains none. But it of necessity confers on every association organized under it, the power to call in its capital stock, either by its directors or by such other officers as the persons associating may designate. This power is essential to the existence of the association as a legal entity.

In several of the Massachusetts cases, the charters and statutes confer an express authority to require the payment of the stock by instalments, but this was never held to render subscribers liable. In 12 Conn. R. 530, (*The Hartford R. R. Co. v. Boorman*), on the same charter before stated, a stockholder who derived his stock by a transfer from an original subscriber, and received a certificate from the company, was held liable to pay the instalments subsequently called for, in an action of assumpsit.

These decisions in Connecticut, although they are not authority here, command my entire assent and concurrence.

The Society for the Illustration of Practical Knowledge v. Abbott, (2 Beavan, 559,) is analogous in principle. There, four projectors of a public company, obtained a charter, by which they and all persons who might become subscribers, were incorporated. The capital was declared to be £20,000, which was to be divided into 400 shares. The four projectors advanced and expended in the prosecution of their enterprise, about £8000, and before any other subscribers joined, they divided the 400 shares among themselves, agreed to call their investment £16,000, and the balance, £4000, they paid to the corporation. After this,

they disposed of a large number of the shares. On the facts becoming known to the new shareholders, a bill was filed by the corporation against the four projectors, to compel them to pay up the full consideration of £20,000, for the shares they had originally taken. Lord Langdale, Master of the Rolls, sustained the bill, and held that it was not competent for them to take the shares without paying the full consideration, although at the time they were the only persons interested in the company.

The authorities to which I have referred, with the few exceptions stated, concur in maintaining the principle upon which I deemed the defendant liable to pay for his shares of stock, and are decisive by their weight and character.

The defendant being liable by force of his subscription for the stock, the resolution of the directors in September, 1841, not to make any further calls upon the shares, was unavailing to discharge his obligation in respect of the association and its creditors. (See *Mangles v. The Grand Collier Dock Company*, 2 Railw. Cas. 359, & 10 Sim. 519.) A subsequent board might have rescinded the resolution, and a receiver acting for creditors must disregard it.

Another question of moment arises in respect of the dividends declared, and which were so arranged as to be cotemporary with the payments of three of the instalments called in on the capital stock, and were applied to the discharge of such instalments.

The 28th section of the general banking law, prohibits dividends by withdrawing the capital stock, or out of profits while the paid up capital is deficient, so long as there are any debts owing by the association. And the law relative to monied corporations, (1 Rev. Stat. 589, § 1,) makes it unlawful for such corporations to make dividends, except from their surplus profits.

The defendant was an active director of the New York Banking Company, and must be deemed chargeable with knowledge of the state of its affairs. According to the statutes, which I have just cited, his right to receive and apply the dividends in question, depends on the state of the institution, and the existence of surplus profits.

There is some doubt upon the testimony, whether the two first dividends did not exceed the profits actually earned when they

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were paid, but the point is not so clear as to authorize me to say that any part of those dividends was made by a withdrawal of the capital.

In regard to the third dividend, payable Nov. 1, 1840, it is clear to my mind that it ought not to have been made. The Hernando Rail Road and Banking Company, had failed long before that period, to meet its engagements with the New York Banking Company, and the balance against it on the books of the latter company, was at that time more than \$112,000. The failure of the Hernando Company, had been communicated to the board of directors of the New York Banking Company, in April, 1840, and again on the 19th of October, 1840, when the dividend was declared. I have no doubt but that the directors *believed* what the president hoped, that there would be no ultimate loss from this debt, and that they declared the dividend in good faith; but I think it was improvident and improper, to divide their apparent surplus, when nearly a third part of their whole capital was locked up in a suspended debt of an uncertain, if not doubtful character. In support of this opinion, I refer to the chancellor's observations in *De Peyster v. The American Insurance Company*, (6 Paige, 486;) and *Scott v. The Eagle Fire Company*, (7 *ibid.* 198.)

The consequence is, that the credit which the defendant received upon his capital stock for the amount of the third dividend, is not to be regarded as a payment of such amount, and the same is still due and payable upon his subscription.

In regard to interest upon the unpaid balance of the defendant's stock, the rule at law appears to be, that the shareholder is liable for interest on the sums called in on his stock, from the times when the calls are payable respectively. By analogy to this rule, it will be proper to charge the defendant with interest from the day fixed in the receiver's advertisement under the statute, for the debtors of the association to make payment, which was the 15th of January, 1844.

As to costs, I have with some hesitation concluded that the defendant should not be charged with the complainant's costs, and they must be borne by the fund. This is a pioneer suit, presenting a question of great importance, and which was an open question in this court. The defendant has made the litigation

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more burthensome than was necessary, but on the other hand the complainant claimed more against him than he was entitled to recover.

The decree will direct the defendant to pay to the receiver the unpaid balance of his twenty-five shares of stock, without any credit for the third dividend, and with interest from January 15, 1844. The amount can be ascertained and inserted in the decree, without going into the master's office.

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COREY and others v. BOYD and others.

COREY and others v. INGOLD and others.

An assignment of a mortgage as security for a debt, by a mortgagee in possession, is evidence that the mortgage is redeemable.

The mortgagor, on a bill to redeem, may rebut the objection of lapse of time, by proof of such an assignment, or of similar acts by the mortgagee, although the mortgagor was not a party to the same.

A mortgagee's possession, within the period of limitation, is not adverse to the title of the mortgagor, so as to defeat a conveyance executed by the latter to a stranger.

While the mortgage is redeemable, the mortgagee's possession is deemed to be in trust for the mortgagor.

Where the mortgagee in possession, has sold and conveyed a portion of the lands, the mortgagor coming to redeem, may affirm the sale, and require the mortgagee to account for the purchase money; in which event, there will be no account of the rents and profits of such portion, subsequent to the sale.

Pending a suit to redeem from a mortgagee in possession, lands which he claimed absolutely, the mortgagor made an assignment of the subject matter, for the benefit of creditors.—*Held*, 1. That the assignment transferred all the mortgagor's estate and interest. 2. That it was not within the provision of the revised statutes against champerty.

The mortgagor's assignment conveyed all his real estate and things in action, in trust, to sell and dispose of the same, and to apply the proceeds for the benefit of creditors.—*Held*, that the assignees took the estate and property, and not a mere

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power in trust ; and that the words " real estate," were sufficient to pass the equity of redemption.

In this state, the equity of redemption is a *legal estate* ; and so continues, notwithstanding the lapse of the day of payment, and although the mortgagee may be in possession ; until it is cut off by foreclosure or otherwise.

Where one, *pendente lite*, acquires the interest of a party in the suit, and thereupon files a supplemental bill ; he must make all the parties to the original bill, whether complainants or defendants, parties to his supplemental bill.

The assignees of a mortgagor, *pendente lite*, who was prosecuting a suit for redemption, filed a supplemental bill, against the original defendants ; and afterwards filed a second supplemental bill against one who, pending the suit, had purchased at a sheriff's sale, the right of the mortgagee in possession, under a judgment recovered by a stranger, prior to the suit.—*Held*, that the right of such purchaser, having originated prior to the original suit, the second supplemental bill was an *original bill in the nature of a supplemental bill*, and was as to him, a new suit. And that the proceedings and testimony in the original suit, and first supplemental suit, (except so much of the same as were introduced into the second supplemental bill,) could not be read against such purchaser.

The mortgagee in possession and his assignee, claiming some rights in the premises, were held to be necessary parties with such purchaser, in the second supplemental bill.

Testimony taken by the complainants in the latter suit, cannot be read against the defendants in the prior suits.

Albany, January 12, 13, 14 ; April 2, 1846.

THE original bill was filed, in December, 1836, by Martin I. Borst, against Alexander Boyd, William A. Boyd, and David Zeilley, for the redemption of six equal undivided seventh parts of a farm of one hundred and twenty acres, situated on the Schoharie Creek, in the town of Middleburgh, in the county of Schoharie, with certain mills and mill privileges thereon.

The premises were mortgaged by John D. Lawyer and wife, to David Lawyer, Junior, on the 29th of April, 1820, to secure \$3500, to be paid in three annual instalments, with annual interest, according to J. D. Lawyer's bond of the same date. D. Lawyer, Jr., on the 2d of July, 1821, assigned the bond and mortgage to Alexander Boyd and Henry Hamilton, in trust to pay certain judgments and other debts. Hamilton declined the trust ; and on the 5th of October, 1821, D. Lawyer, Jr., made an absolute transfer of the bond and mortgage to A. Boyd. This transfer was recorded in July, 1822.

D. Lawyer, Jr., went into possession of the premises at the

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date of the mortgage, and A. Boyd succeeded him in the possession, in May, 1823, and they were held by him and those claiming under him, until the hearing of the cause.

On the 29th of December, 1831, Alexander Boyd conveyed in fee to David Zeilley, a portion of the mortgaged premises, consisting of a carding and fulling mill, and about an acre of land, with the use of water for the mill. Zeilley entered into possession, and has continued there ever since. He paid \$2500 for the lands conveyed to him. Previous to this, and on the 3d of May, 1825, Alexander Boyd, by an assignment annexed to the mortgage, transferred the bond and mortgage to John Ingold, William Boyd and Robert Shepherd, to secure the payment of certain debts and liabilities, in the assignment mentioned. On the 7th of August, 1827, W. Boyd and Shepherd agreed with William A. Boyd, a son of Alexander, that on his paying the debt secured to them, they would assign to W. A. Boyd, their interest in the bond and mortgage; and accordingly, on the 30th day of October, 1830, by an instrument reciting that W. A. Boyd had paid or secured their debt, and that Alexander Boyd consented thereto, W. Boyd and Shepherd assigned the bond and mortgage to William A. Boyd. Ingold's claim to the same, was satisfied before August, 1827.

On the 29th of January, 1836, John D. Lawyer and wife conveyed the equity of redemption, and all their right and title in and to the mortgaged premises, to the complainant, Martin I. Borst.

The original bill prayed an account and redemption. To this bill, Alexander Boyd put in a plea, setting up that at the time of the conveyance to M. I. Borst, the premises were in the actual possession of David Zeilley, and of Alexander Boyd by his tenants, William Warner and William A. Boyd, claiming the same by a title adverse to the title of John D. Lawyer. A replication to this plea, was filed by the complainant.

W. A. Boyd answered, setting forth that the title was originally vested in J. D. Lawyer by a fraud against the creditors of D. Lawyer, Jr. He also set up, (and proof was made to the same effect,) that after the date of the mortgage, in 1820 and 1821, judgments were recovered against D. Lawyer, Jr., while he

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was in possession of the premises, and the same were sold on executions upon such judgments, and the certificates of sale in one instance assigned to Alexander Boyd, and in another he received a deed from the party to whom the sheriff executed a conveyance on the sale. W. A. Boyd alleged, that on Ingold's interest in the assignment to him with W. Boyd and Shepherd being extinguished, Alexander Boyd, in 1827, agreed with him, that if he would pay the debt to W. Boyd and Shepherd, the bond and mortgage should be his, and all the mortgaged premises, except those afterwards conveyed to Zeilley, and the grist mill and dwelling adjacent, with one acre of land and the appurtenances. And that he accordingly made all the payments to W. Boyd and Shepherd. The answer then set forth substantial and permanent improvements made on the premises by Alexander Boyd, W. A. Boyd and Zeilley, to the amount of about eight thousand dollars. That when W. A. Boyd paid W. Boyd and Shepherd, A. Boyd claimed the premises in fee, and W. A. B. believed he had a perfect title thereto. He entered into and has since held possession under that belief, of the part agreed to be his, claiming it as his own. He insisted that the deed from J. D. Lawyer to M. I. Borst was void, by reason of the adverse possession, and also by force of the sixth section of title sixth of chapter first of the fourth part of the revised statutes. A replication was filed to this answer.

David Zeilley also answered, and an issue was joined as to him, but the complainant having assented to permit his title to stand good, it is unnecessary to state his answer.

Proofs to some extent, were taken in the original suit; when on the 27th of September, 1839, the complainant, Martin I. Borst, by a deed of assignment, granted, sold and assigned all his real estate, personal property, and choses in action, to David P. Corey, Samuel Newkirk, and Joseph I. Borst, in trust to sell and dispose of the same, and apply the proceeds in payment of his debts, and to pay the surplus, if any, to the assignor.

On the 28th of November, 1840, these assignees filed a supplemental bill against Alexander and William A. Boyd and Zeilley, to have the benefit of the original suit. Martin I. Borst was not made a party to this bill.

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The defendants, A. and W. A. Boyd, put in answers, insisting that the assignment to Corey and others was void as to these premises, by reason of adverse possession, and that it gave the assignees no authority to file a bill, or maintain any action in regard to the premises. Zeilley suffered the supplemental bill to be taken as confessed. Upon the issues on the Boyd's answers, testimony was taken at large.

In May, 1843, the assignees, Corey and others, filed a second supplemental bill against John Ingold, Samuel Lyon, Harman Becker, Jeremiah L. Becker, and Joseph Bouck, to have the benefit of the two prior suits; under which bill the following facts appeared.

On the 23d day of August, 1839, Alexander Boyd conveyed in fee to Lyon twenty acres, to H. Becker six acres, to J. L. Becker fourteen acres, and to W. A. Boyd twenty acres, parcels of the mortgaged premises; at the same time executing to them a covenant to refund, in case Borst's suit was decided against him, out of the first moneys received on Borst's redemption, and assigning to them the D. Lawyer, Jr. bond and mortgage to that extent.

About the same time, A. Boyd conveyed forty-two acres in like manner to Joseph Bouck; being one of the parcels bought by Ingold, as next mentioned.

The interest of Ingold arose under a judgment in the supreme court, recovered and docketed by the Mohawk Bank, on the 31st day of March, 1836, against Alexander Boyd, David Boyd, and Ingold, in which the latter was a surety for A. B.; by virtue of an execution on which judgment, Ingold on the first of July, 1842, became the purchaser at a sheriff's sale, of the grist mill premises, and a parcel of forty-two acres, both being parts of the mortgaged premises. The sheriff conveyed to Ingold, in October, 1843, pursuant to this sale.

The answer of Ingold set up these facts, and the other defences before stated. He insisted that the Mohawk Bank ought to have been parties to the original bill, and for that cause his rights were not affected by any of the proceedings in the original or first supplemental suits. The other defendants to the second

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supplemental bill, suffered it to be taken as confessed. None of the parties to the first bill, were made parties in the second supplemental bill.

Issue was joined on Ingold's answer, and some documentary evidence taken thereon. It appeared that a notice of the pendency of a suit, entitled with the names of M. I. Borst and his three assignees, as complainants, was filed, May 14th, 1842, in the Schoharie clerk's office, which stated the objects of the original and first supplemental suits.

A. C. Paige, for the complainants.

D. Cady, for the defendants, A. Boyd, W. A. Boyd, and J. Ingold.

THE ASSISTANT VICE-CHANCELLOR.—When the original bill was filed, the lands in question which were not claimed by Zeilley, were possessed by or under Alexander Boyd; and William A. Boyd claimed that he had a right therein, not only as a tenant, but as a purchaser, in consequence of his paying Boyd and Shepherd the debt for which John D. Lawyer's mortgage had been assigned to them.

The interest of William A. Boyd has not been divested, and my first inquiry will be directed to Martin I. Borst's right to redeem, as against the two Boyds.

There is no doubt but that David Lawyer, Jr., entered into the possession of the lands, as mortgagee. He had no other interest or pretence of right at that time. Alexander Boyd succeeded him in that possession, and with no other or better claim to the lands than D. Lawyer, Jr., had when he entered. The conveyances to A. Boyd subsequently, under the sheriff's sales against the mortgagee, D. Lawyer, Jr., gave Boyd no better or larger estate than the absolute assignment of the mortgage conferred on him.

There is no validity in the objection, that the remedy of Borst was barred by lapse of time.

The mortgagee's possession commenced in or about May, 1820. On the 3d of May, 1825, A. Boyd assigned the mortgage

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under which he held the possession, to Messrs. Ingold, Boyd, and Shepherd; and on the 23d of October, 1830, the mortgage was re-assigned to W. A. Boyd, with Alexander Boyd's assent. These transactions are decisive that the mortgage was redeemable as late as October, 1830; and although the mortgagor was not a party to them, he may avail himself of the evidence which they afford of the nature of the mortgagee's interest and claim. (*Smart v. Hunt*, 4 Ves. 478, note a; *Hardy v. Reeves*, 4 ibid. 466, 479; and *S. C. nomine, Hansard v. Hardy*, 18 ibid. 455, 459.)

The original bill was filed in December, 1836, so that the limitation prescribed by the revised statutes, was no bar, even if that were applicable. In *Williamson v. Field*, which was a similar case, (decided July 21, 1845,)(a) I held that the revised statutes did not apply.

Another objection to the claim made by the original bill, is that when John D. Lawyer conveyed the equity of redemption to Martin I. Borst, in January, 1836, the lands were held adversely to the grantor.

This position I think cannot be maintained. A mortgagee's possession, at any period within twenty years from his entry, so far from being hostile to that of the mortgagor, is in equity deemed a possession in trust for him. (4 Kent's Com. 167, 2d ed.; *Cholmondeley v. Clinton*, 2 Merivale, 361.) In England, where a mortgage conveys the entire legal estate, the possession of the mortgagor was never deemed adverse, so as to interfere with the mortgagee's conveying or assigning the estate, so long as his remedy on the mortgage was not barred by lapse of time.

At the time of the conveyance from John D. Lawyer to Borst, the former had an undoubted right to redeem. How, then, could Boyd's possession at that time be considered as adverse? The mortgagee's possession is just as consistent with the mortgagor's title, as is the possession of the latter with the title and interest of the mortgagee. One as well as the other, may in time ripen into a valid hostile title, but the intermediate possession cannot

(a) Since reported, 2 Sand. Ch. R. 533.

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be deemed adverse, so far as to defeat or impair transfers of the existing title of the party out of possession. A mortgagee may work a *disseisin*, but I apprehend within the period requisite for barring redemption, that can only be done by some direct, open and unequivocal act, in hostility to the title of the mortgagor.

On this point, I refer to *Anon.* (3 Atkyns, 313 ;) *Hovenden v. Lord Annesley*, (2 Sch. & Lef. 637 ;) *Cholmondeley v. Clinton*, (2 Mer. 171, 357 to 360 ;) *Fenwick v. Macey's Executors*, (1 Dana, 280, 297, 299, 301.)

These views dispose of the defences interposed by the Boyd's. Zeilley makes no objection to a decree which will leave him undisturbed in his grant from Alexander Boyd ; and the complainants assent to affirm the sale to Zeilley, and to hold Boyd responsible for the purchase money. At the date of this conveyance, (January, 1831,) Alexander Boyd was in equity, the principal mortgagee. The re-assignment of the mortgage to W. A. Boyd, gave him no greater interest than to the extent of his advances to Boyd and Shepherd. I therefore think it is competent for the complainants to ratify the sale to Zeilley, in the manner proposed. But in so doing, they can no longer claim an account for the rents and profits of that portion of the lands mortgaged, from and after the conveyance to Zeilley. The purchase money will properly apply as an extinguishment of so much of the mortgage debt, at the date of the deed.

Second. The next inquiry relates to the right of the complainants in the first supplemental suit. The question is distinctly presented in reference to the Boyd's, whatever may be the case as to Ingold.

Two objections are made to the title of Martin I. Borst's assignees. In the first place, it is said that the premises were the subject of controversy in this court, at the time of the assignment, and were not in the possession of Borst. Also, that it was void by the provision against buying or selling the titles of persons not in possession of lands. (2 Rev. Stat. 691, §§ 5 and 6.)

What I have already said in respect of J. D. Lawyer's conveyance to Borst, disposes of this objection. And I might add, as to the sixth section of the statute against champerty, that an assignment for the benefit of creditors, can scarcely be deemed a

buying, or selling, or a promise or covenant to convey, within the meaning of the statute.

Next, it is said that the assignees took no estate, but only a power in trust, by the deed to them; and that the terms of the conveyance were not sufficient to pass the right or interest which Borst had in these premises.

The former position is taken on the clause which reserves the surplus to the assignor, after paying all his debts. Inasmuch as the law would give this to him, without any provision in the assignment, it is manifest that its insertion cannot make the instrument any worse than if it were omitted.

As to the other ground, it is urged for the reason that the assignment describes and conveys "*real estate* and personal property" only; whereas Borst's right in these premises was a mere equity, growing out of the realty, but having no characteristic of a legal right or title to land. My view of Borst's right is wholly different. It is true it was the *equity of redemption*, but in our law that is a legal estate, until it is barred by foreclosure or otherwise, which may be conveyed as land, and sold on execution, and in which a widow is entitled to dower. Neither the lapse of the day of payment, or the mortgagee's being in possession, affect the nature of the mortgagor's estate. Whether a mortgagee by those events, also has an estate upon which a judgment may become a lien, is a question arising in another part of this case.

I am satisfied therefore that Martin I. Borst's right and title vested in his assignees.

Third. I now approach the second supplemental bill, and I meet the questions of form and of parties, which were raised in respect of both of the auxiliary bills.

Where a person having acquired the interest of a party to a suit, which is pending, thinks proper himself to file a supplemental bill; he must make all the other parties to the original bill, whether complainants or defendants, parties to his supplemental bill. (2 Barbour's Ch. Pr. 69; 3 Daniell's Ch. Pr. 165, 180; *Binks v. Binks*, 2 Bligh, 593; *Feary v. Stephenson*, 1 Beavan, 42.) Therefore, as Martin I. Borst retained a contingent interest in the property, he was a necessary party in both of the bills

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filed by his assignees. But this objection as to Borst, comes too late from the other parties, at the hearing.

The second bill filed by the assignees, must be regarded as an original bill in the nature of a supplemental bill, as against Ingold, and indeed it was, as to him, a new suit. His title, although acquired *pendente lite*, came to him from the Mohawk Bank, through their judgment, which if it were a lien at all, was a lien before the original bill was filed, and was unaffected by that suit.

The Mohawk Bank should have been a party to the original suit, if as Ingold claims, their judgment were a lien. (Story's Eq. Pl. 188.)

The defendant Ingold, having succeeded to their title, stands in the same situation that the bank would have done, if the last bill had been filed against the bank, as still retaining the lien. (3 Daniell's C. Pr. 176.) This being so, the proceedings and testimony in the original suit, (except so far as they are introduced into the last bill,) do not affect Ingold, and cannot be read against him. (2 Barb. Ch. Pr. 85; 3 Daniell's, 164, 189.) If Ingold had succeeded to nothing more than the interest which A. Boyd had at the commencement of the suit, a simple supplemental bill would have sufficed, and the defendants in the prior suit would not have been necessary parties. But as the case stands, I think they should be parties defendant with Ingold. (See 3 Daniell's, 178, 179; 2 Barbour, 86.)

There is the further reason for making them parties in this case, that W. A. Boyd claims an interest in the mortgage, which may conflict with that of Ingold, in decreeing redemption.

The Mohawk Bank appears to be a necessary party, in respect of their judgment, in connection with the agreement on the sale, by A. Boyd to Lyon and others. The latter was made during the pendency of the suit, but the bank's lien existing before the suit, was the consideration of the provision in their behalf in the agreements. This of course is on the assumption that there was a lien; and Ingold's claim under their judgment and sale having driven the complainants to make him a party, the Mohawk Bank is a proper party on the same ground.

I do not determine the point as to the lien of the Mohawk

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Bank judgment, at this time, because the suit against Ingold, being an original suit, must needs stand over to have the proofs made applicable to both the supplemental and the original suits. Some of the evidence before me applies to the suit against Ingold, but it cannot be read in the suits against the Boyd's, and *vice versa*.

In respect of Lyon and the other purchasers from A. Boyd, in 1839, a supplemental bill against such purchasers only, would have sufficed ; had they not become connected with the Mohawk Bank judgment.

The decree to be entered in this stage of the suits, may declare the right of Martin I. Borst's assignees to redeem the lands in question, as against the Boyd's and the respective purchasers from A. Boyd, limiting it as to Zeilley, as I have heretofore suggested. And it may provide for the assignees amending their second supplemental bill, by bringing in the proper parties, and in such other manner as they may be advised, with leave to Ingold to answer anew ; or the assignees may exhibit a new supplemental bill for that purpose. All questions between Ingold and the assignees, will be reserved.

The only objection of a formal nature, which was taken in Ingold's answer, is that the Mohawk Bank should have been a party to the original bill ; but as this is well taken, and the difficulties in the way of a final disposition of the subject, have chiefly arisen from that omission ; I think the complainants must pay to Ingold, the costs of the hearing, and of his preparation therefor.(a)

(a) In July, 1846, J. Ingold signed a consent that the complainants might take a decree for redemption, and for other relief as court might deem equitable, and waived any objection on the ground of the want of proper parties. A decree for redemption was made accordingly.

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LETTERS testamentary were granted here, to the executrix named in the will of a testator whose domicil was here, but who died during a temporary residence at Carthagena in South America. H. who had consigned goods to him at that place, proceeded thither and obtained from the United States Consul such property as by the marks he was satisfied belonged to the consignor. H. thereupon, suppressing the fact of the existence of a will in New York, obtained a grant of administration to himself, from the court at Carthagena, and under that grant, possessed himself of the testator's effects in that country. In a suit by the executrix against H.,

Held, 1. That H. was not accountable for the goods delivered to him by the consul, there being no reasonable doubt but that they were his own.

2. That the administration at Carthagena, was entirely ancillary and subordinate to that instituted in New York; and that the foreign administrator, on being served with process here, must account to the primary legal representative, for the assets which he has received abroad.

3. That this court will not interfere with the course of administration which the foreign tribunal has directed, or which the laws there prescribe; and the accounting here, will be limited to the assets remaining after the payment of expenses, and of debts in the foreign state, discharged in due course.

An executrix cannot set aside transfers of property, made by her testator without consideration, for the purpose of defrauding creditors.

The case of *Ordronaux v. Rey*, (2 Sand. Ch. R. 33,) referred to and confirmed.

A witness, whose examination is apparently closed, and an adjournment taken place, and another witness been examined; cannot be recalled by the party for whom he has testified, and examined anew on the subject of his former examination.

Nor can a party reserve the right to recall a witness, whose examination has been proceeded in; without the consent of the adverse party, unless the officer taking the testimony shall so direct for cause shown.

December 12, 1845; May 7, 1846.

THE bill was filed by Elizabeth Ordronaux against Sebastian N. Helie, claiming that the latter had possessed himself of a very large amount of the property and effects of her late husband, John Ordronaux, of which she claimed an account and payment to her. She claimed such payment in the first instance, on the ground of her having a lien and priority upon all the effects of her deceased husband, by force of a settlement executed between them under the French law, on their marriage in Paris, in 1815; she being at that time a resident of Paris, and bringing

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to the marriage, a fortune of 300,000 francs. The grounds of this claim are stated at large, in the report of the case of *Ordronaux v. Rey*, (2 Sand. Ch. R. 33,) to which reference is made for the facts.

The complainant made a further claim as executrix of the last will and testament of her husband, executed here, and dated December 29, 1827. John Ordronaux was domiciled in the city of New York before his marriage, and from thence till his death. In November, 1839, he proceeded to Carthagenia in South America, leaving his family in New York, and continued there until his death in August, 1841. The surrogate of the county of New York, granted letters testamentary to his widow.

The defendant married a daughter of the testator, who is dead leaving issue.

A part of the claim made upon the defendant, was in respect of dealings and transactions between him and Ordronaux, relative to which a great mass of testimony was presented, but under the view of the point taken by the court, it is unnecessary to state any portion of it here.

It should be noticed however, that Ordronaux in 1837, became insolvent, and many of the alleged transfers, if in fact made to Helie for his benefit, must have been in fraud of creditors.

After Ordronaux went to South America, Helie made several consignments of goods to him for sale, and to a large amount.

On the death of Ordronaux being made known in New York, the will of 1827, was presented for probate, and Helie opposed its admission. In December, 1841, he departed for Carthagenia. On his arrival, he applied to the consul of the United States for the goods left in Ordronaux's hands at his death, and the consul delivered the same to him, so far as his right could be identified by the marks on the goods.

He then petitioned the court at Carthagenia, for letters of administration of Ordronaux's effects, stating that he was a son-in-law of O., and making no allusion to any testamentary disposition. Letters were granted to him in accordance with his petition, the judgment of the court reciting that it was for the want of any personal representative, legal or testamentary.

By force of this administration, Helie became possessed of all

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the residue of the property and effects which were in Ordronaux's possession at Carthagenæ. A great portion of this residue, Helie claimed in his own right, as being the proceeds of his goods consigned to O. for sale. The administration in Carthagenæ was granted February 5, 1842: And letters testamentary were finally granted to the complainant by the surrogate of New York, on the 5th day of April, 1842.

These facts, with some that are stated in the opinion of the court, will suffice for a proper understanding of the decision.

Two questions of practice, upon the recalling of witnesses for a further examination, will be found fully set forth in the opinion.

W. Curtis Noyes, for the complainant.

C. B. Moore and *F. B. Cutting*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—I will first dispose of the motion to suppress certain portions of the testimony.

1. The re-examination of Mr. Verren. Mr. V. was examined on the 12th October, 1843, in behalf of the complainant, and was cross-examined, and his testimony apparently closed. The complainant on the same day called and examined another witness, and the examination was then adjourned to October 16th. On that day Mr. Verren appeared with the complainant, and desired to correct his testimony previously given. To this no objection was made, and he proceeded to make the correction. The complainant followed it with a question to which the defendant objected on the ground that his examination was closed, and the examiner sustained the objection; but the complainant insisting, the question was put. It did not relate to any new matter or to matter arising out of the testimony of other witnesses.

I think the further examination must be suppressed. The testimony of the witness was undoubtedly closed on the previous occasion, and the complainant was not at liberty to call him again to the subject matter of the question put after his explanation, without the leave of the court.

The further cross-examination of course falls with the re-examination upon which it ensued.

2. The testimony of Pierre Hombert. Hombert was called and examined by the complainant, on the 16th of October. The examiner adjourned till the next day, and then the complainant produced and examined Mr. Bouchaud. After his deposition was closed, she recalled Hombert, and proceeded with his deposition. He was cross-examined, then re-examined twice, with an intervening cross-examination, and then was cross-examined a third time. The complainant's counsel thereupon stated that he reserved the right to recall and re-examine Hombert at a future time, to which the defendant refused to assent. After this seven other witnesses were produced and examined by the complainant, and some others were further examined, when at length, on the 17th of November, 1843, Hombert was recalled on her part, and offered for another re-examination. The defendant objected to his further examination, but the complainant proceeded with it.

The subsequent examination of other witnesses, shows that Hombert's deposition was closed on the 17th of October. The parties have no right in defiance of the 84th Rule of the court, to recall witnesses in the manner that was pursued in this instance, and the assumption and attempted reservation of such a right by the complainant, at the close of Hombert's testimony on the 17th of October, does not affect the question in the least. The further examination of Hombert after that day, was manifestly improper, and it must be suppressed.

The complainant claims relief on two entirely distinct grounds. First, as a preferred creditor, having a lien upon all her late husband's property, by force of the French Marriage Settlement; and secondly, as the executrix of his last will and testament.

I. As to the settlement, it was before me in *Ordronaux v. Rey*, (August 2, 1844,) not yet reported; (a) and I decided that the complainant had no such lien as is now claimed, and that

(a) Now reported, 2 Sand. Ch. R. 33.

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she is not entitled to a preference over other creditors of John Ordronaux.

This renders it unnecessary for me to examine the points made by the defendant's counsel, upon the sufficiency of the testimony introduced, to prove the marriage settlement.

II. The remaining claim made by the complainant, is in her capacity of executrix of J. Ordronaux.

The demands which occupy so great a space in the pleadings and testimony, are founded upon alleged transfers of property by Ordronaux to the defendant, on a secret trust for O., and for the purpose of defeating the complainant's rights and claims under her marriage settlement. She has not established such a standing as a creditor, as will enable her to set aside these transfers, if their existence and design were fully proved. Nor is her bill filed in behalf of the creditors at large, as well as herself, so as to warrant the court in treating it as a suit by creditors, to avoid fraudulent sales and conveyances. The suit is to be regarded as prosecuted by the personal representative of John Ordronaux; and in that view, it is difficult to perceive on what principle the court can be called upon to vacate his acts, however fraudulent they may have been against his creditors. Neither the common law nor the statute, avoids such acts, as against the party or his representatives.

Without resting upon this point, I am prepared to say, after an attentive examination of the testimony, that it fails to overcome the defendant's answer. Even if the answer were not responsive to the bill, it would be unsafe to charge a party upon such testimony. Ordronaux and Helie are shown to have had extensive business transactions, in which there were necessarily large payments on both sides. From their relationship, it was natural that less care should be taken by both, to preserve the evidence of their respective payments and claims; while it was equally probable that there was a frequent interchange of the checks, notes and bills of each, for the accommodation of the other, of which in their mutual confidence, no formal entries were made. Under such circumstances of fact and probability, and after so great a lapse of time, the testimony relied upon by the complainant, is altogether too vague, indefinite and general,

to enable this court to decide that the defendant is liable to account, either as the debtor, or the trustee of Ordronaux.

I must decide against the complainant, in respect of all the claims brought forward in the bill prior to the death of Ordronaux.

A distinct and interesting branch of the case, arises upon the proceedings of the defendant at Carthagera, and in its vicinity, after the death of Ordronaux.

It appears that certain merchandise in the possession of Ordronaux when he died, was delivered to the defendant by the United States consul, on the defendant's claim that it was his property, before any administration was granted at Carthagera. This property was so identified by the marks remaining upon it, that the consul was satisfied of the validity of the defendant's claim. His answer, responsive to the bill, asserts such claim; he has proved that he made large consignments of merchandise apparently his own, to Ordronaux at Carthagera; and the complainant has not shown any reasonable ground for doubting, that the merchandise delivered to him before the administration, was his own property.

I do not think that he should be required to account for this portion of the effects which he received at Carthagera.

The effects which he obtained by means of the letters of administration, stand upon a different footing. The very circumstance that he thus obtained them, makes it incumbent upon him to account for them, and to show that although they came to his hands as the legal representative of Ordronaux, they are in truth his own property. The manner in which he secured the grant of administration, ought to make any court entertaining the subject, the more vigilant to require from him a full and satisfactory account of his proceedings under the grant. It cannot be denied that he stole a march upon the executrix of Ordronaux, in taking out these letters of administration; and that he concealed from the court at Carthagera, the important fact that Ordronaux left a last will and testament. Whether the will was executed in a form which would entitle it to respect in that court, is not material to this inquiry. It suffices that the existence of a testamentary disposition, claimed to be valid, was a circum-

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stance which would evidently have retarded, if not defeated, his claim to the administration.

I feel no hesitation in holding that the defendant must account for all the effects which he received at Carthagera, and in South America, which were in the possession or charge of Ordronaux at his death, with the single exception of those delivered to the defendant by the consul prior to the grant of administration.

The inquiry remains, can he be compelled to account in this tribunal? It is clear that the domicil of John Ordronaux was in this city, and was not changed by his residence in Carthagera. Indeed, in the proceedings there upon conferring administration, he is described as "a foreigner," and as such the notices are given to the consul of "his country," that is, the United States. Aside from the superior authority conferred by his will, it is plain that the complainant is his chief and principal legal representative, and that the administration at Carthagera, was entirely ancillary and subordinate to that instituted here.

On this ground, the law appears to be well settled in this state, that the foreign administrator, his person being within the jurisdiction of this court, may be compelled to account here to the primary legal representative, for the assets which he has received abroad. Not that this court will interfere with the course of administration which the foreign tribunal has directed, or which the laws there prescribe. But for the assets remaining after the payment of expenses, and the discharge of debts in due course, in the foreign state; this court will hold the administrator there appointed, accountable when found here, to the executor or other primary representative of the decedent. It is scarcely necessary to say, that this jurisdiction would not be exercised, when the foreign administrator has fully discharged his functions in the country where he was appointed, and has no effects for which he would there be held accountable. For the principle which governs this case, I refer to *McNamara v. Dwyer*, (7 Paige, 239;) *Daves v. Head*, (3 Pick. 128;) Story's Conflict of Laws, § 514, 514 *a. b.*, 518.

The supplemental bill appears to have failed in its principal objects. Nevertheless, as there is to be an account, and some of the matters specified in the supplemental bill will enter into the

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account, I will not at this time dispose of the question of costs on that bill.

There must be a decree for an account, restricted so as to conform to the views which I have expressed; and all further questions and directions will be reserved.

HOWLAND and others, Executors of HONE, v. HECKSCHER and others.

In settling a debt due to an intestate, from one of his children and next of kin who is insolvent, the intestate having left a widow and nine children, there must be credited to such child, one-ninth of two thirds of the personal estate; his debt being included as a part of the assets. If the debt exceed his distributive share, it will be deemed assets to the extent of such share.

Where the widow of the intestate died before distribution, and such insolvent child became entitled to share in her estate, as one of her legatees and next of kin; it was *held*, that the legal representatives of the intestate father, could not withhold from the widow's administrator, any part of her third of the personal property of the intestate, in order to apply it to the debt due to the latter from the insolvent next of kin.

Though the widow of an intestate may accept her third of the personal estate in stocks, securities or movables; she has no right or title to a third of any specific chattel or thing in action; and she cannot be compelled to receive either one or the other, or any thing but money.

She is in no sense, (prior to such a distinct acceptance,) a creditor of persons who stand as debtors to the intestate.

The principal trusts of the will of a decedent, having been declared void by a vice-chancellor, some years after his death; the payments made under it being sanctioned by the decree, and the widow being directed to elect between her dower and certain valid provisions made for her by the will; appeals were taken from the decree, which protracted the suit; pending the appeals, the executors continued to pay and keep their accounts as before; and the widow neglected to make her election, and died before the decision, which was an affirmance of the decree. In a suit between the executors, and the assignees of one of the next of kin, *Held*, 1. That the latter could not object to payments made under the will, prior to the decree.

2. That the payments according to the will subsequent to the vice-chancellor's decree, were not valid, and must be disallowed. And 3. That the vice-chancellor, to whom the suit on the will was remitted by the appellate court, had jurisdiction.

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tion to permit the widow's administrator to make the election granted to her, although the time limited for her election elapsed in her lifetime.

Where one of the next of kin, being largely indebted to the estate, made an assignment for creditors preferring that debt, and the executors besides having his distributive share, held a large fund set apart to meet legacies which were not yet payable, and the periods of payment were in part contingent; it was *held*, that the executors after applying to the debt his share of the assets in hand, must also apply the reasonable value of his interest in the surplus of the legacy fund, before enforcing payment of the balance of his debt from the assignees.

February 10, 11; May 20, 1846.

THE bill was filed in September, 1841, by the executors of John Hone, deceased, against Charles A. Heckscher and John Aspinwall, assignees of Isaac S. Hone, and John Aspinwall as administrator of Mrs. Joanna, the widow of John Hone. The following are the material circumstances on which the judgment of the court was pronounced; as ascertained from the pleadings and proofs.

John Hone died in April, 1832, seised and possessed of a very large real and personal estate, leaving a widow, and seven children and the descendants of two deceased children, his heirs at law. Isaac S. Hone was one of his children. He also left a will dated in July, 1831, by which he gave to his wife an annuity, his plate, furniture &c., and a life estate in his mansion. By a codicil in August, 1831, he gave \$6000, to each of his unmarried grand-children living at his death, payable on their attaining twenty-one or marrying; and he made a special bequest of a sum of \$30,000. He gave all the residue of his estate to his executors, upon trusts; by which they were to keep the property together, divide the accruing income among the nine branches of his family, and at the end of twenty-one years, or as soon thereafter as the executors should deem discreet, they were to divide the whole estate equally among the heirs, *per stirpes*.

Prior to 1836, a bill was filed to obtain a construction of the will by this court, the result of which was, that the trusts of the will as to the residue of the estate were adjudged to be void, by the vice-chancellor of the first circuit, and an intestacy was declared in respect of all his property, except the special bequest and the provisions for his widow and his unmarried grand-child-

dren. The annuity to the widow fell with the trust estate, and as to the other bequests for her benefit, she was directed to elect between them and her right of dower within ninety days after service of a copy of the decree. By the decree, the payments made by the executors under the will, in respect of the income of the estate, were not to be disturbed. The decree of the vice-chancellor (which was affirmed,) was made May 15, 1837. For a report of the decision before the chancellor, see *Hone v. Van Schaick*, (7 Paige, 221 ;) and in the court of errors, S. C. 20 Wend. 564. The executors nevertheless, continued to pay under the will, until the decision in the court of last resort, which was made late in December, 1838.

On the 5th of August, 1836, Isaac S. Hone, executed an assignment of all his share of his father's estate, to Messrs. Heckscher and Aspinwall, in trust, to pay first, a debt of over \$32,000, due from him to the estate of his father, and then to distribute the remainder among certain other of his creditors. His assignees were made parties to the pending suit for the construction of John Hone's will, and appealed from portions of the vice-chancellor's decree.

Mrs. Joanna Hone, the widow of the testator, died April 2, 1838, and Mr. Aspinwall became her administrator. She made no election in respect of her dower, in her lifetime. After the suit for the construction of the will was finally decided and remitted to the vice-chancellor, an application was made to him, on notice to the assignees of I. S. Hone, and the other parties, for a direction to her administrator to make the election prescribed in the decree ; and an order was thereupon made, July 8, 1839, directing him to make such election ; and within the period limited, he elected to waive the bequests in the will, and take her dower and distributive share of the estate.

In passing the accounts of the executors before the master, under the decree in the will suit, a fund of more than \$100,000, was permitted to remain in their hands, to meet the legacies to the unmarried grand children ; of whom eighteen who were living at the testator's death, had not become entitled to receive their legacies, when the proofs in this cause were taken.

Serious questions arose respecting the debt of I. S. Hone to his

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father's estate, and his interest as heir and next of kin in that, as well as his mother's property. His assignees received his share of the real estate of his father, but had not come into the possession of any part of the personal property. The assignees contended, that in stating the account between Isaac S. Hone and the executors of John Hone, the former was to be credited with one-ninth of such indebtedness, it being his proportion of all of the latter's personal estate as one of the next of kin. That he should have the benefit of all credits entered to him in the accounts of the executors, so long as they acted under the will, as well after the vice-chancellor's decree as before, and whether arising from real or personal estate : That he was also to be credited with one-ninth of all the moneys and property of the estate of John Hone, remaining with the executors, including his interest in the probable surplus of the legacy fund. And the widow's third of the personal estate, not having been paid over to her, or her administrator, they further insisted that I. S. Hone's account was to be credited with his share of such third part, to which he was entitled as her legatee or next of kin. They objected also that the vice-chancellor's order, permitting her administrator to make the election prescribed in the decree setting aside the will, was invalid, and inoperative, because the order was alleged to have been made *ex parte*, the time for making such election had elapsed, the decree had become the decree of the chancellor and the court of errors, and the vice chancellor could not enlarge or alter it ; and by receiving her annuity after the decree, she had declared her election to adhere to the provisions made for her by the will.

On the other hand, the executors contended that the proper credit to be made for I. S. Hone's interest in his father's estate as next of kin was one-ninth of two-thirds, instead of one-ninth of the personal estate, and the same proportion of the rents of the real estate : And that the executors of John Hone had no control over I. S. Hone's right or interest as legatee or next of kin, in his mother's estate, and could not withhold her share of the testator's personal assets from her administrator, on the ground that a part of it would belong to I. S. Hone, and he was indebted in a greater sum to his father's executors. They also insisted

that the payments made by them prior to the affirmance of the decree, were valid and proper. Some other questions of minor importance, were presented by the respective parties, which are noticed in the opinion of the court.

After the cause was at issue, a reference to a master was ordered by consent, with authority to him, to take testimony, and state the accounts between the parties. After proceeding under this order for a time, it became apparent that it would be impracticable to make any substantial progress, until some of the leading principles of the accounting were settled by the court; and the parties agreed to bring the cause to a hearing, for directions in the premises; using the testimony before the master as testimony in the cause, together with certain documentary evidence agreed upon. In this manner the case came on to be heard.

E. Sandford, and J. Anthon, for the complainants.

W. M. Evarts and J. Prescott Hall, for the assignees of I. S. Hone.

M. S. Bidwell, for Mrs. Hone's administrator.

THE ASSISTANT VICE-CHANCELLOR.—The order enabling Mrs. Joanna Hone's administrator to make the election granted to her in the decree of the vice-chancellor, avoiding the trusts of her husband's will, was made in a suit to which the defendants were parties. If it were irregular or erroneous, they should have proceeded to correct it in that suit. It cannot be questioned collaterally. The election to take her dower, instead of the legacy and other provisions in lieu of it, must be deemed valid; and it has relation to the date of the original decree, May 15th, 1837. The payments made to Mrs. Hone under the will prior to that date, are legalized by the decree, and are not to be disturbed.

For the same reason, the complainants are not to go back of the era of that decree, in correcting the credits which they have made to Isaac S. Hone, for his dividends payable from the estate. The decree expressly confirmed their distribution of the income,

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and the evidence shows that this direction was carried out in their accounting before the master.

That accounting is not however to prevent the proper adjustment of the credits made upon their books to Isaac S. Hone, since May 15th, 1837. The decree avoiding the trusts, has ever since been in force, and there is nothing in the case which warranted the trustees and executors in making payments in conformity to those trusts, after that day. All the payments made since, must be applied and settled in conformity to the rights of all the parties consequent upon the intestacy then established.

Applying these principles, how much have the complainants received on account of Isaac S. Hone's debt to John Hone, and how much have they in hand, or should they have retained, belonging to Isaac S. Hone, and which they had a right to apply towards that debt?

The wide difference between the views of the complainants and those of the assignees, is owing to the death of Mrs. Joanna Hone, and the consequent succession of Isaac S. Hone to a part of her estate, together with the circumstance that at her death, a great part of her property was still in the hands of the complainants, as executors of John Hone.

I have been unable to perceive why these facts should affect the account between the executors and Isaac, or how they can diminish his debt to the estate. When the assignment was executed to Messrs. Heckscher and Aspinwall, Isaac S. Hone, (as was afterwards shown by the decree of May 15, 1837,) was entitled to one-ninth part of his father's real estate, subject to his mother's dower, and to one-ninth of two-third parts of his father's personal estate, after the payment of his valid legacies. The other third of the personal property belonged to Mrs. Hone absolutely. The assignment transferred these interests of Isaac S. Hone, and nothing more, to his co-defendants.

Now the complainants have never had in their hands, *belonging to Isaac S. Hone*, any more than one-ninth of two-thirds of the personal property. While the widow lived, the other third belonged to her. On her death, it passed to her executor or administrator. He had a perfect right to demand it from the complainants. They could not resist the administrator's demand,

by showing that Isaac was indebted to them in a large sum, and that he would be entitled to receive a like sum from the administrator, as legatee or next of kin of his mother.

In the strongest point of view in which the defendants can present it, the case is this. The complainants owe to Mrs. Hone's administrator, one-third of their testator's personal property, which third I will assume to be \$80,000. The administrator is bound to pay one-ninth of that sum to Isaac, and I will call that a debt from him to Isaac of \$9000. Isaac owes to the complainants, as such executors, \$18,000, for example. And upon this it is claimed, that the complainants may retain from the administrator, towards Isaac's debt, the \$9000 which the administrator is to pay the latter; or in other words, they may pay \$9000 of their debt to the administrator, in Isaac's debt to them. Thus making an offset of Isaac's debt to their own creditor, because the latter is Isaac's debtor.

It seems manifest to me that no such right of set-off exists, either at law or in equity. If, on his mother's death, Isaac S. Hone had sold his interest in her estate; or, as was stated to be the fact in this case, had assigned it for the benefit of creditors; such an offset as is attempted here, would not avail the administrator in a suit by his vendee or assignee.

It was urged that Isaac's debt to his father's estate, was a component part of his mother's third of the personalty, and as such came to her administrator. But this is not true in point of law. Mrs. Hone was entitled to a third, not in this or that specific stock, security or debt, in which the personalty happened to be at the testator's death; but to money. She might accept stock or securities, but she could neither compel their delivery, or be compelled to take them. Isaac S. Hone was never a debtor to her, or to her administrator, in respect of this debt, either legally or equitably. So far as it was collected, she was entitled to her third of the proceeds; and so from time to time, as collections should be made. But such third, she would receive as and towards her distributive share of the estate of John Hone, and in no sense as a creditor of Isaac S. Hone.

The simple and direct mode of ascertaining how much the

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complainants ought to credit to Isaac S. Hone, in respect of his father's personal estate, was this. From the gross amount of the personalty, including Isaac's debt, deduct the legacies and other specific charges and expenses. The balance is the net distributable personal property, as to which there was an intestacy. One third of this sum belonged to the widow; and one-ninth of the remaining two-thirds was Isaac's share, as one of the next of kin. This share the executors were entitled to retain and pass to his credit. It will be perceived that this mode assumes the debt of Isaac to be good and collectible. If his share in the estate had constituted his only means of paying the debt, the gross valuation of the personal property in ascertaining such share, would be diminished accordingly.

I believe there is no question but that by means of his distributive share, and his assignment to the defendants, the debt to his father's estate is made good.

As the accounts have not been kept, or stated in the manner I have detailed, the most feasible plan for ascertaining how much is still due to the complainants on this debt, will be to adopt the principles now settled to the existing forms of those accounts.

Thus there must be credited to Isaac S. Hone's account, his ninth part of two-thirds of the debt itself.

The items of credit to May 15th, 1837, are to stand untouched. The credits subsequent to that time, are to be adjusted so as to give to him no more than his ninth part of two-thirds of the personal estate distributed, and the like proportion of the income of the real estate until his mother's death. After her death, he should be credited with one-ninth of the income of the real estate.

His interest in the personal property not yet distributed, must be ascertained by the master, and credited towards the debt. In arriving at this interest, the complainants must bring into the account, all payments made by them to the widow after May 15th, 1837, which became forfeited by the election made under the order of July 8th, 1839. And as to the doubtful assets, the master will ascertain their value from the best data which the parties can furnish to him. The value of Isaac S. Hone's in-

terest in the legacy fund, ought also to be computed by the master. This can be done on the principle of life annuities, with a reasonable allowance for the contingency of the female legatees marrying under the age of twenty-one years.

There is no justice or propriety in the executors requiring these assignees to pay the estate in full, when there is a fund in their own hands, in which the debtor has a vested interest; especially where the extent of that interest is not so contingent but that it may be computed with almost mathematical precision.

Credit will of course be given for the payments made by the assignees.

On the balance being reported by the master, the assignees must pay the same to the complainants. As to costs, each party may retain their own costs out of the respective estates which they represent.

Decree accordingly.

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VAN WEZEL v. WYCKOFF and others.

THE statute of limitations does not run in favor of heirs, during the three years next succeeding the granting of letters testamentary or of administration on the estate of their ancestor.

A creditor of the ancestor, who is entitled to maintain a suit against heirs in respect of the real estate descended to them, may have a decree against the proceeds of such real estate where the same have been paid into court upon a sale of the property under an order or decree of the court.

A subsequent suit against the heirs, in behalf of all creditors, will not affect a suit already instituted by a creditor in his own behalf, unless an order of the court be obtained directing him to come in under the former proceeding.

A solicitor for a non-resident complainant, in whose behalf security for costs has been filed, by a surety who justified *ex parte*, is a competent witness presumptively, although he testifies before the time for excepting to the surety has expired.

February 11 ; May 25, 1846.

THE bill was filed in August, 1840, against the heirs at law of John Wyckoff, late of Gowanus, in the county of Kings, deceased, to compel the payment of a promissory note made by him, dated July 2, 1834, and payable thirty days after date to James Buchanan or order.

It appeared that the note was signed by the intestate, and was indorsed by J. C. Buchanan, for the payee. It was proved that J. C. Buchanan was the agent of the payee, and always acted for him and represented him in his absence. The witness who at that time was attorney and counsel for the payee, had also seen a power of attorney under which J. C. B. acted.

It further appeared that after the note became due, a suit at law was commenced against the maker, in the complainant's name, in the supreme court in August, 1834, and after an inquest had been taken it was discovered that the maker died previous to the inquest, and the suit was abandoned. The note was mislaid, and did not come to the notice of the complainant's solicitor for several years. The complainant did not reside in this state while the suit was pending.

The foregoing facts were proved by his solicitor, who was objected to as an incompetent witness on the ground that he was liable for the costs of the suit: In answer to which it was shown that on the day previous to his examination, a bond to the defendants as security for their costs, in the penalty required by the statute, executed by a surety who justified, was filed with the clerk of the court. The objection was nevertheless persisted in, on the ground that the defendants had nineteen days left in which to except to the surety at the time the solicitor was examined, and his liability for costs continued until the security was perfected. The examination was taken subject to the objection.

It was further shown that the personal assets of John Wyckoff were insufficient to pay his debts, and the same had been duly administered. That he left four heirs, to whom a large real estate descended, which was afterwards sold in a partition suit, and the share of the youngest heir, John Wyckoff, who is an infant, was paid to the clerk of the court, to be invested for his benefit. The three other heirs received their portions.

While this suit was pending, Jacques Smith, a creditor of the intestate, filed a bill in behalf of himself and other creditors, against the heirs, in which a decree was made in September, 1842, for the payment of creditors whose demands were established before the master on the reference in that suit. It did not appear that the complainant had any notice of that suit, or of the proceedings under it.

The adult defendants joined in an answer to the bill in this cause, and the infant John Wyckoff, by his *guardian ad litem* also put in an answer. The defendants set up the statute of limitations, and other grounds of defence.

W. Mulock, for the complainants.

W. S. Sears, for the infant defendant.

N. F. Waring, for the other defendants.

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THE ASSISTANT VICE-CHANCELLOR.—The motion to strike out the testimony of Mr. Muloch must be denied. At the time he was examined, he was presumptively relieved from his liability for the costs. Security for costs had been filed, and the obligor in the bond had justified. It is true that there were nineteen days remaining in which the defendants might except to the security, but the preliminary justification shows in the absence of rebutting evidence, that the exception would have been fruitless.

In the analogous case of special bail in the courts of law, it is the practice to allow other bail to be substituted on the trial, so as to enable the defendants to use the bail originally put, in as witnesses; and the possibility that on an exception, the new bail may be found insufficient, does not render such witnesses incompetent. (*Leggett v. Boyd*, 3 Wend. 376.)

Upon the merits of the case, I think the proof of the note and of the complainant's title to it, is sufficient. The authority of J. C. Buchanan to make the indorsement, is proved by his acting as agent, independent of the testimony as to the written power. But if this were otherwise, the objection to the parol evidence was not made in season.

The statute of limitations is not a valid defence. Administration on the estate of the defendant's ancestor, was granted in October, 1834. The complainant could not sue the heirs, until three years after that time, and during this period, the statute did not run in favor of the heirs. (2 R. S. 109, § 53; *Butts v. Genung*, 5 Paige, 256; *Leonard v. Morris*, 9 *ibid.* 90.)

I do not find any proof in support of the objection that this debt was not presented to the administrators upon their advertising for claims. If this were proved, it would avail nothing, as the administrators did not have assets enough to pay all the other debts.

As to the suit of Jacques Smith against these heirs, in behalf of all the creditors, the decrees were made in 1842, and probably the suit had not been long pending. At all events, there is no pretence but that this suit was commenced first. It does not appear that the complainant knew of Smith's suit, and if the defendants desired to save expense, they should have moved the

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court to compel him to come in and prove his demand under the decree in that suit.

The complainant is entitled to a decree against each of the heirs, for one-fourth part of his debt and interest and costs of suit.

The proportion payable by the infant, will be paid by the clerk out of the funds of the infant in his hands. And the costs of the *guardian ad litem* must be paid out of the same fund.

Decree accordingly,

ARNOLD and others v. GILBERT and others.

A TESTATOR, having a very large real estate, after some minor bequests in his will, gave to his wife for life, in lieu of dower, one-third of the net rents of his real estate, so long as it should remain unsold. He gave to each of his five sons, five thousand dollars, payable out of the sales of his real or personal estate; the legacies to two of whom, G. and W., were to be invested in stock or on mortgage, the interest paid to them for life respectively, and after their deaths to their respective children, and if either should die without a child living, his legacy was to go to the three other sons and the survivor of G. and W., and the latter's share to be placed in the trusts provided subsequently. To another son, E. he gave the income of three thousand dollars for his life; the fund to be raised out of his real and personal estate; and after his death to be divided among the five other sons. To the widow of a deceased son, T., he gave the interest of ten thousand dollars, during her widowhood, the fund to be raised from sales of his real estate and invested, and afterwards to be divided among T.'s three daughters. To two of those daughters, there was a further legacy of a thousand dollars each.

All the residue of his estate, the testator devised and gave to his executors in trust, to receive the rents thereof, and immediately after his death to sell enough of the real estate to pay his debts; to pay one-third of the net rents to his wife; to pay the interest on the respective legacies, and the annuity to E., out of the rents; that they should and might, from time to time, proceed to sell any part or all of his real estate; the sales to be made with as little delay as the good of the estate would permit, to the extent of investing the several funds, and paying the legacies before provided; and one-third of all sales to be invested, and the interest paid to his wife for life. And in further trust, that upon a sale and final distribution, there should be an estimate of all remaining, and the surplus, including the fund of which E. was to receive the income, and the funds for the use of his

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wife for life, was to be distributed whenever, as soon, and as often as could be done, to the close of his whole estate and its concerns. Of this surplus, one seventh was to go to each of three sons absolutely; another seventh to his son G., and another to his son W. The two latter were to be invested, and the interest paid to each for life, and at the death of either, to their respective children: But if either died without children living, the amounts coming to them, or either of them, were to revert back to and become an integral part of the testator's estate, and be divided between the three sons first named and the survivor of G. and W., or to the children of the latter taking a parent's share: And if one of G. and W. survived the other, his interest was to be limited to the survivor for life, and after his death to be divided as before provided. As to the other two-sevenths of the surplus, the interest of one was to be paid to the testator's daughter H., and of the other to his daughter F., so long as they respectively remained widows; upon their death or re-marriage, respectively, F.'s share was to go to her lawful heirs as in cases of intestacy; and the share of H. was to revert back and merge in his estate, and become part thereof, and be divided between his five sons and his daughter F.; but F.'s part was to go to her use while a widow only, and on her death or re-marriage, was to go to her children or grand-children, as before provided as to her seventh; and the portions of the sons, G. and W., in the seventh part of H., were to be under the same limitations and uses as before provided in respect of their several seventh parts of the surplus estate. The will also contained powers to lease lots for terms of years, to repair and rebuild, and to exchange gores and irregular pieces of land. In a suit by the children of the testator's son T., to set aside the will, on the ground that the trusts were illegal;

Held, 1. That the provision for the widow of the testator in the real estate, under the will, was to be regarded as a trust of real estate at the death of the testator, and not to be deemed as converted into personalty.

2. That the shares given to F., G. and W., arising from the seventh part of H., in the third of the real estate from which the widow was to receive her income, were inalienable during three lives in being, and the trusts thereof were void.
3. The same was held of the limitations of the two seventh parts of G. and W. in the same third part.

Held further, that the testator did not intend a general distribution, until after the death of both his widow and his son E.; during whose lives, the power of alienation and the absolute ownership were therefore suspended; wherefore,

1. The whole of the seventh designed for H., that for F., and the two sevenths for G. and W., were each and all suspended for three or more lives in being, and were all void trusts.
2. That the trusts of the will, being so far void as to overturn the main design of the testator, the overthrow of the residue necessarily followed; even if the latter were not involved in the fate of the void trust devise to the executors.
3. That the gift to the widow of T. was valid; but the daughters of T. must relinquish their legacies, on coming in as heirs at law.
4. That the legacies of five thousand dollars to the five sons, must fail for the same cause; and also, because they were dependent on the void trusts of the will, and those to G. and W. formed a part of the trusts declared void.

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5. That being void as express trusts, the devise could not be maintained as a power in trust, in respect of those legacies.
6. That the acts of the trustees under the will must be confirmed, on avoiding the trusts in behalf of the complainants.

Argued, Sept. 11, Nov. 6, Dec. 2, 3 and 20, 1845, and Feb. 25, 1846; Decided May 23, 1846.

THE bill in this cause was filed on the fourteenth day of February, 1840, by Lemuel Arnold and Caroline his wife, Charlotte Gilbert, Jane Gilbert and William Gilbert, against Garret Gilbert, Clinton Gilbert, Edward P. Heyer, and Silvanus Miller, surviving executors and trustees of the last will and testament of William W. Gilbert, deceased, and Betsey Gilbert, David Gilbert, Clinton Gilbert, Warren Gilbert, George W. Gilbert, Garret Gilbert, Elsey Fish, Franklin Y. Vail and Catharine Matilda his wife, and Edward H. Owen, Eleazer Hand and Alexander N. Gunn, as assignees of Garret Gilbert; to set aside the trusts of the will of W. W. Gilbert, and to have an account of his real and personal estate.

The bill set forth that William W. Gilbert, late of the city of New York, deceased, on the 4th day of January, 1832, made and published his last will and testament, in the words and figures following, that is to say :

"In the name of God, Amen. I, William W. Gilbert, of the city of New York, gentleman, do, by these presents, make, publish and declare my last will and testament, as follows :

1. First.—I commit my immortal soul to Almighty God, and hope for mercy and salvation through the merits of my blessed Redeemer, Jesus Christ.

2. Item.—I will and direct my executors, hereinafter named, to pay all my debts, of every nature, character and description, as soon after my decease as practicable.

3. Item.—I give, devise and bequeath unto my beloved wife, Betsey Gilbert, all my household furniture, plate, carriages, and horses, together with every other article and thing belonging to my household establishment, in and about the house and residence where I now live, saving and excepting a writing desk, or secretary, which I give to my son, Garret Gilbert, now standing

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in my front parlor, to have and hold to my said wife and son, respectively, absolutely, and forever.

4. Item.—I give, devise and bequeath unto my said wife, for and during, and for the full end and term of her natural life, the one-third part of the rents, issues and profits of my real estate, (deducting the expenses of collection, insurance, repairs, and all the other customary and incidental charges;) the said one-third part to be paid to my said wife, so long as my real estate shall remain unsold, when her thirds are to be paid, according to the provisions hereinafter named, of and concerning the same.

5. Item.—I give and devise the mansion, or dwelling house, in which I now reside, to my said wife, for one year after my decease, free from all rent and charge; the above bequests of personal estate, and the one-third of the rents, issues and profits of my real estate while unsold, and the further provisions hereinafter contained, for and in behalf of my wife, are declared to be in full bar of and in lieu of all dower of, in and to my real estate, and of, in and to any part or parcel thereof.

6. Item.—I give, devise and bequeath unto each and every one of my five sons, to wit: Garret Gilbert, David Gilbert, Clinton Gilbert, Warren Gilbert, and George W. Gilbert, the sum of five thousand dollars, payable out of the sales of real or personal estate, as hereinafter directed, that is to say: to Garret Gilbert, David Gilbert and Clinton Gilbert, each their respective legacies of five thousand dollars, as soon as my executors are enabled to pay the same from the funds of my estate, under the provisions of this my will; and that the legacies of five thousand dollars, given to each of my two sons, Warren Gilbert and George W. Gilbert, be invested in some public stock, or on bond secured by mortgage; the interest of which shall be paid to them, respectively, as received, for and during their natural lives, and after their or either of their deaths, the said sum shall go to the lawful child or children, (if there be such,) of my said sons, Warren and George W. Gilbert; but, if either or both of them, should die without any lawful child or children then living, then his or their said legacy shall go to and belong to my sons, Garret, David and Clinton Gilbert, and the survivor of said George W. or Warren, or amongst the child or children of the one dead: the

child or children to take the part of the parent so deceased, and to be placed in trusts, herein or hereafter provided of and concerning the bequests made to them, respectively, and I give and devise the same accordingly.

7. Item.—I give, devise and bequeath the interest or income of the sum of three thousand dollars, to my son, Ephraim Gilbert, for and during and for the full end and term of his natural life, to be paid quarter-yearly; the said amount or sum to be raised for that purpose from my personal and real estate; and until so raised, the sum of two hundred and ten dollars is to be paid to my said son, Ephraim Gilbert, quarter yearly, by my executors, hereinafter named; and after the death of my said son, Ephraim, then the said sum of three thousand dollars is to be equally divided between my five sons, Garret, David, Clinton, Warren, and George W. Gilbert, their executors, administrators and assigns, share and share alike.

8. Item.—I give, devise and bequeath unto my daughter-in-law, Jane Gilbert, the widow of my deceased son, Thomas W. Gilbert, for and during the time she shall remain a widow, and until her re-marriage, and no longer, the yearly interest of the sum of ten thousand dollars; which said sum is to be raised for that purpose from the sales of my real estate, and loaned at interest on bond secured by mortgage, or invested in some safe and productive stock; and from and after the death or re-marriage of my said daughter-in-law, the principal to go to and be equally divided between my grand-daughters, Antoinette, Caroline and Charlotte Gilbert, the three daughters of my late son, Thomas W. Gilbert.

9. And in addition to this sum of ten thousand dollars, given to my three grand-daughters last mentioned, I give, devise and bequeath unto my two grand-daughters, Caroline Gilbert and Charlotte Gilbert, each the sum of one thousand dollars; this last mentioned sum is given to my two said grand-daughters, for their affectionate and tender care during a protracted sickness, manifested by both of them toward their aged grand-parent, payable as soon as practicable; but, should either of said grand-daughters die leaving no child or children, and before marriage, then the part or portion of the said sum of ten thousand dollars of the

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one so dying, shall go to and belong to her surviving sister or sisters, or unto her or their child or children, (if any,) and the child or children to take the parent's part only, and I give and devise the same accordingly.

10. All the rest, residue and remainder of my estate, both real and personal, whatsoever and wheresoever the same may be, I give, devise and bequeath unto my two sons, Garret Gilbert and Clinton Gilbert, and Edward P. Heyer, Thomas Stokes and Silvanus Miller, or unto such of them as shall undertake the burden of executing this my will; and to whom letters testamentary shall be duly granted; as joint tenants, and not as tenants in common, and to the survivors or survivor of such of them; but upon the special confidence and trust of and concerning the same, as hereinafter set forth and expressed, or meant and intended so to be, that is to say:

11. Upon the trusts to take, have, hold, use, and possess, all my real estate whatsoever and wheresoever, from and immediately after my death, (excepting my mansion, or dwelling house,) and that, also, after my wife shall have possessed it as above provided; and to receive the rents, issues and profits thereof; and from and immediately after my death to sell any part of my real estate which may be necessary to pay my debts; and from the rents, issues and profits of my real estate, and until it shall be sold, I give, devise and bequeath unto my beloved wife, the one-third part of the net amount of all the rents, issues and profits, deducting losses or expenses of collection, (if any there should be;) and upon this further trust, that my said executors, as joint tenants as aforesaid, pay unto the respective legatees the interest on their respective legacies, out of the rents, issues and profits of my real estate, to commence with such interest within six months after my decease; and if the same shall not be sufficient to pay such interest and the annuity to my said son, Ephraim, then all the legatees are to be paid rateably and in proportion to the whole amount devised to be so divided.

12. And upon this further trust, that my executors, or the joint tenants aforesaid, shall and may, from time to time, proceed to sell any part of or all my real estate, either at private sale or at public auction, and to give, grant and convey the same in fee

simple, by all proper and lawful conveyances to the purchasers thereof, so as to protect the purchaser or purchasers fully in the estate so conveyed to them under this my will, in all and every case, both at law and in equity.

13. And upon every such sale, if it can be effected, I recommend that at least one-third of the consideration money be secured thereon by bond and mortgage, this being my wife's right in lieu of her dower as aforesaid ; so, that if she should live until my real estate shall all be sold, her interest may be safely placed and her income secure.

14. And further, that the sales of my real estate shall be made with a view to invest the sums herein required, and to pay the legacies herein devised, with as little delay as can be, always having a regard for the interest of my whole estate, as well as for the provisions made for particular legatees, it being my will that the pecuniary or other devises herein made shall be carried into effect and consummated from the funds resulting from or arising out of my real estate.

15. And in further trust, that upon a sale and final distribution of my estate, that there shall be an estimate, an account taken of the whole remaining, and the surplus, including the sum placed at interest for my son, Ephraim, for his support during his life, as well as the funds for the use of my wife during her life, be divided and distributed in the following manner, whenever, as soon, and as often as can be done, to the close and settlement of my whole estate and its concerns, that is to say : one-seventh part thereof to my son, Garret Gilbert ; the one-seventh part thereof to my son, David Gilbert ; the one-seventh part thereof to my son, Clinton Gilbert ; the one-seventh part thereof to my son George W. Gilbert ; the one-seventh part thereof to my son, Warren Gilbert.

16. And to each of my daughters, Catharine Hunt and Elsey Fish, the interest of the one-seventh part each during the time they shall respectively remain single and unmarried, and after such re-marriage or death of them, or either of them, then the sums, the interest of which they may have been entitled to, shall be disposed of as follows, that is to say : the part or portion given as aforesaid to my daughter, Elsey Fish, shall go to and

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belong to her lawful heirs, according to the laws of the state of New York in cases of intestacy, as applicable to my said daughter's children and heirs, as if she had an absolute estate in this bequest, given to her for life or singleness, as aforesaid.

17. The part or portion given for the use of my daughter, Catharine Hunt, shall, upon her re-marriage or death, revert back and merge into my estate, so that it shall become a part and parcel thereof, and be equally divided between my said sons, Garret, David, Clinton, Warren, and George W. Gilbert, and my daughter, Elsey Fish; her part, however, to be given to her as for life or re-marriage, as aforesaid; and on her death or re-marriage to go to her children or grand-children, as the case may be, according to law, as provided of and concerning the one-seventh given to her as aforesaid; and the part or portion which may so arise as regards or effects my sons, George W. and Warren Gilbert, shall be placed under the same trusts, uses and limitations, provided and directed of and concerning the trust, use and limitation of their respective one-seventh parts of my estate, in all and every manner and way whatever.

18. Excepting five thousand dollars out of the part given to my daughter, Catharine Hunt, as aforesaid; which said sum my executors are to vest for the benefit of her daughter, Matilda Vail; the interest whereof she shall receive for her sole and separate use, and on her own receipt or order during her natural life, and after her death the principal shall go to her heirs at law; the whole to be without the control of her husband at all times.

19. And as it regards or relates to the part or portion given to my sons, George W. Gilbert and Warren Gilbert, that the same be loaned out or invested, as aforesaid, and the interest to be paid to them yearly, or as often as received; and after his or their decease, to his or their child or children, as the case may be. But, in the event of either or both dying without children then living, the said amounts coming to them, or either of them, shall revert back to and become an integral part of my estate, and be equally divided, share and share alike, between my sons, Garret, David, Clinton, and the survivor of my two sons, George W. and Warren, or to the child and children, if he or they leave such. Such child or children to take a parent's part of this

fund, (if there should be such ;) and if one of my said last mentioned sons should survive the other, then his interest is to be limited to his use for life, and to be divided after his death, as is provided of and concerning the one-seventh part of my residuary estate, so given and limited in this my will.

20. And further, that my estate, of every kind, character and description, shall be vested in and be the lawful property and estate of the joint-tenants and executors aforesaid, or in such of them as shall have letters testamentary granted to them, or the survivors or survivor of them, as joint-tenants, to the full extent of the law, for all and every purpose and intent to fulfil the provisions of this my will, and of all trusts, uses, limitations, and conditions arising therefrom ; and that full power and lawful authority to enable them to execute the same to all and every interest, and meant and intended, is hereby given and conferred, as fully and amply as if the powers and authority were more fully, particularly and at large, set forth and expressed.

21. And further, that my executors and joint-tenants as aforesaid, have full right and lawful authority to lease out lots for a term of years, upon such covenants and conditions, with such rents reserved, as they may deem reasonable ; to insure any and all houses, stores, messuages, hereditaments, or other buildings belonging to my estate, against loss or damage by fire ; and out of the money received by such loss by fire, (if any there should be,) to repair or rebuild the same, according to their discretion. And I authorize and empower my executors to compromise any doubtful, desperate, or suspicious debts, due and owing to my estate, and to submit all disputes and controversies to arbitration, or to one or more referees ; and generally, I hereby give them full power and authority in all these respects, as they may arise in the fulfilment of their duties.

22. Item.—I do authorize them, from time to time, to appoint an agent or collector for my estate, at a stipulated salary or defined commission for his services, (who may be selected from amongst themselves ;) and that my executors shall not be answerable for any improper conduct or malversation of such agent or collector, nor shall one executor be answerable for the

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acts or omissions of the other, unless from wilful negligence or fraud.

23. And I also give and grant unto my executors as aforesaid, full power to liquidate, arrange and pay all assessments or other impositions by the corporation of the city of New York on any part of my real estate, and to act in the best manner in those cases, which, in their judgment and discretion, shall appear to be beneficial or necessary, and whereof, by the ordinances of the corporation already made, and which may be hereafter made, my lots and grounds may be irregular and so situated and formed, that it may be necessary to sell, purchase or exchange slips, or gores, or other pieces of ground for the general benefit of my estate, to enable my executors to manage and benefit my estate in these cases, and I do hereby authorize them to buy, sell or exchange, with all persons, proprietors or agents for them, and to give full deeds of conveyance in the law necessary and lawful in the premises, and to receive conveyances for any premises purchased, in trusts for the general purposes and objects of this my will, and to dispose thereof when necessary, by proper deeds of conveyance to the purchaser, in all and every case whatever.

24. And lastly, I do hereby nominate, constitute and appoint my two sons, Garret Gilbert and Clinton Gilbert, and my friends, Edward P. Heyer, Thomas Stokes and Silvanus Miller, Esquires, executors of this my last will and testament ; whom I do hereby appoint the guardians of my infant children, and dispose of the custody and tuition of such child to the said guardians during their minority, according to law ; hereby revoking and annulling all former or other wills by me at any time made. In witness whereof, I have hereunto set my hand and seal, this fourth day of January, in the year of our Lord one thousand eight hundred and thirty-two.

WM. W. GILBERT. [L. s.]

Signed, sealed, published, and declared by the testator to be his last will and testament, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses ; J. R. Satterlee, residing at 394 Hudson street, city of New York ; Morris Miller David-

son, residing No. 10 Cherry street, city of New York; Abr'm. Miller, residing No. 434 Hudson street, New York."

The bill further stated, that the testator, William W. Gilbert, departed this life on the 14th day of February, 1832, without having revoked, or in any manner altered this last will and testament, leaving a large real and personal estate: the real estate being situated principally in the city of New York, and the personal estate, consisting of household furniture and other articles in and about the premises occupied by him, and of notes, bonds and accounts against sundry persons and incorporated companies, of which an inventory had been filed by the executors thereafter named, in the office of the surrogate of the county of New York.

That the will was, on the 6th day of April, 1832, proved in due form of law, before James Campbell, surrogate of the county of New York, both as a will of real and personal estate, and letters testamentary were issued on the 7th day of May, 1832, in due form of law, by the surrogate, to Clinton Gilbert, Garret Gilbert, Edward P. Heyer, Thomas Stokes, and Silvanus Miller, in the will named; who assumed upon themselves the burden of the execution thereof, and of the trusts created or pretended to be created, in and by such last will and testament.

That the bequest to his wife, Betsey Gilbert, of his household furniture, plate, carriages, and horses, together with every other article and thing belonging to his household establishment, except as in the will mentioned, was without any provision or limitation to defeat or make void the same; but, the devise to her of one-third part of the rents, issues and profits of his real estate, (deducting expenses of collection, insurance, repairs, and all other customary and incidental charges,) was defeasible and void, upon the executors selling the real estate; and the devise to Mrs. Betsey Gilbert, after such sale of the real estate, was involved in and formed a part of, and depended upon the trusts in and by the will attempted to be created, and afterwards more particularly mentioned in the bill.

That Betsey Gilbert accepted the devises and bequests in the

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will in lieu of her dower, and had ever since the death of the testator, continued to receive and enjoy the same.

That the testator died seized of a large real estate, consisting of several hundred building lots in the city of New York, located in thriving and well settled parts thereof, worth several hundred thousand dollars ; but these complainants were not informed and could not state the particulars of the real estate, and they prayed from the defendants a full and complete disclosure and discovery of all and every part of the real estate ; where situated, how described, and by what title the testator held the same, whether in fee or otherwise.

That Thomas Stokes died sometime in the year 1833 ; but at what time, and whether before or after the sales of the real estate thereafter mentioned, and whether he united in the sales or any of them, the complainants were not informed, and they prayed a full discovery from the defendants.

That the defendants, Garret Gilbert, Clinton Gilbert, Edward P. Heyer, and Silvanus Miller, in the will named, after they had taken upon themselves the burden of the execution of the will, and of the trusts therein mentioned, proceeded to sell the real estate, or some part thereof, whereof the testator died seized ; and for that purpose had and held sundry public sales thereof during the year 1833, or at some other times, and realized out of said sales a large amount of money, amounting to nearly five hundred thousand dollars, as the complainants were informed ; and they prayed from the executors and trustees, a full disclosure and discovery of the sales, and the amounts and of all the particulars, sums and dates thereof.

That a considerable portion of the real estate whereof the testator died seized still remained unsold, in the hands and under the control of the trustees and executors ; and that the trustees and executors had also in their hands and possession, and under their control, a large amount of money, or assets, mortgages, stock or other investments, belonging to the estate ; amounting, as the bill stated, to nearly three hundred thousand dollars ; but of the particulars, nature, condition, and description of the real estate so remaining unsold, and of the funds, assets or investments then held by the trustees, the complainants were not informed and

prayed from the trustees and executors, a full and complete disclosure and discovery.

That William W. Gilbert, deceased, left him surviving as his heirs at law, the following named persons, to wit: his sons, Garret Gilbert, David Gilbert, Clinton Gilbert, Warren Gilbert, George W. Gilbert, and Ephraim Gilbert, all of the city of New York, aforesaid; Antoinette Gilbert, of Ogdensburgh, in this state, and the complainants, Caroline Arnold and Charlotte Gilbert, his grand-daughters, and daughters of his deceased son, Thomas W. Gilbert; Catharine Hunt, his daughter, the widow of Andrew Hunt; and Elsey Fish, his daughter, the widow of Whitehead Fish, deceased; and William Gilbert, the son of Thomas W. Gilbert, deceased.

(The bill then contained allegations that the will was obtained from the testator by importunity and undue influence, and when he was incapable by reason of his great age, (87 years,) and his bodily and mental infirmities, to make a valid will; and that he was not of sound and disposing mind and memory, when he executed the will in question.)

The bill then stated, that by the will it is directed and declared, that the trustees and executors therein named, should receive the rents, issues and profits of, and interest accruing from his estate, and pay therefrom, to each of the testator's daughters, Catharine Hunt and Elsey Fish, the interest of one-seventh part of the rest, residue and remainder of the testator's estate; such rest, residue and remainder, being by far, the greater portion of his whole estate; while they should remain single and unmarried. And the bill charged, that this devise created a trust to receive the rents, issues and profits of real estate, and pay them over to the *cestuis que trust*, which is contrary to the laws of this state, and absolutely void.

That the part or portion given for the use of the testator's daughter, Catharine Hunt, was, by the will, directed, upon her remarriage or death, to revert back and merge into his estate, so that it should become a part and parcel thereof, and be equally divided between his sons, Garret, David, Clinton, Warren, and George, and his daughter, Elsey Fish; and, as it regards the part or portion thereof given to George and Warren, it was by

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the will further directed, that the interest thereof should be paid to them during their natural lives ; and, in the event of either or both dying without children then living, the same should revert back to and become an integral part of the testator's estate, and be equally divided, share and share alike, between his sons Garret, David, Clinton, and the survivor of George and Warren ; and, if one of his sons last mentioned should survive the other, then his interest to be limited to the use of the survivor for life.

And the bill charged that the power of alienation of the one-seventh part of the residuum, so given for the use of Catharine Hunt, or of some portion thereof, was by those provisions of the will, suspended during the lives of three persons in being, to wit : during the lives of Catharine Hunt, George W. and Warren Gilbert, and the longest liver of them ; and was contrary to the laws of this state, and therefore void.

That the trust in and by the will created for the benefit of George W. and Warren Gilbert, was a trust for the trustees to receive the rents, issues and profits of the real estate of the testator, and the interest from the avails thereof, and to pay the same to George W. and Warren : and that such trust was contrary to the laws of this state, and therefore void. And that in consequence of the premises, the estate whereof William W. Gilbert died seized, descended to his heirs at law and next of kin.

The bill further stated, that William Gilbert, the son of Thomas W. Gilbert, deceased, and one of the heirs at law of William W. Gilbert, deceased, had executed to the complainants, Jane Gilbert and Lemuel Arnold, a deed of trust of all his estate, real and personal, and they have accepted of such trust, and were seized as his trustees of all his estate and interest in and to the estate whereof the testator died seized. And that Antoinette, the daughter of Thomas W. Gilbert, and grand-daughter of the testator, died on or about August, 1838, leaving no child or children her surviving. And that Ephraim Gilbert, one of the sons of the testator, died since the death of the testator, leaving no child or children him surviving.

That Garret Gilbert, after the death of the testator, and in or about the year 1838, executed a deed of trust to Edward H. Owen, Alexander N. Gunn and Eleazer Hand, of the city of

New York, for the benefit of his creditors, of all his estate, real and personal; which three trustees have accepted of the trust, and were, or had been, seised of the real estate whereof Garret Gilbert was the owner, at the time of executing such deed.

That before the time of the intermarriage of the complainants, Lemuel Arnold and Caroline Arnold, a deed of marriage settlement was executed between them, whereby all the estate of the latter was granted and conveyed to Jane Gilbert and Charlotte Gilbert in trust, for the separate use and benefit of Caroline, and was held by them as her trustees.

That Clinton Gilbert and David Gilbert are now seised, and claim to own and hold in fee, certain land and premises in the city of New York, whereof the testator died seised, and which they obtained, either directly or indirectly, from the trustees and executors in the will named; and the bill prayed from Clinton and David, and from the trustees, a full disclosure and discovery thereof. The bill contained a like allegation in respect of Garret Gilbert, at the time of executing his assignment to Messrs. Owen, Gunn and Hand; and prayed from Garret Gilbert, and Messrs. Owen, Hand and Gunn, a full disclosure and discovery thereof.

That the complainant, Charlotte Gilbert, at the time of the death of her grand-father, the testator, was a minor, under the age of twenty-one years, to wit: of the age of nineteen years; and that Caroline Gilbert intermarried with the complainant, Lemuel Arnold, on the 11th day of October, 1837, and after she was of age. That sometime in March, 1838, the testator's daughter, Catharine Hunt, died, unmarried, leaving Catharine Matilda, her only child, who was married to Franklin Y. Vail, and was residing in St. Augustine, Florida.

The bill then prayed an answer and discovery; that the trusts created in and by the last will and testament of William W. Gilbert, or such of them, and so far as they should appear to be invalid, might be decreed by this court to be void.

That the surviving trustees, might be decreed to account for all the estate, moneys, evidences of debt, choses in action, and other property that had come into their hands, or the hands of either of them, as such trustees.

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That such portion of the estate as might be necessary to pay or secure such of the several legacies, annuities and bequests given by the will, as might be deemed valid, should be set aside for that purpose, and safely invested, where necessary, under the direction of this court.

That the rights of the complainants, and of the heirs at law and next of kin of William W. Gilbert, deceased, of, in and to his estate, real and personal, might be ascertained and determined by this court. That the trustees might be decreed to deliver and transfer to the next of kin, under the direction of one of the masters of this court, all the personal property in their possession, or in the possession of either of them, belonging to the estate of William W. Gilbert. That the trustees, or either of them, that might have the evidences of title of the real estate in their possession, be decreed to deliver over the same to such person or persons as this court should direct. That the accounts of the trustees and executors might be finally settled and closed, under the direction of this court. That the right and interest of Betsey Gilbert, the widow, to dower in the real estate whereof William died seised, might be settled and determined by this court, agreeable to law. That, if the trust estate and the devise to the trustees be declared void, that then the real estate whereof the testator died seised, and yet remaining unsold, might be decreed to descend to his heirs at law; and might be divided among his heirs at law, or the persons who might be decreed to be entitled to the same, in proportion to their respective interests therein, by commissioners or otherwise, as this court should direct; or, if a division thereof should be impracticable, that then the estate, or such part thereof as could not be divided, be sold, under the direction of this court, and the proceeds distributed among the several parties, according to their respective rights in the premises. And the bill prayed for general relief.

The defendants, except Vail and wife, demurred and answered in June, 1840. Warren and George W. Gilbert put in a joint and several demurrer and answer; as did Garret Gilbert, Clinton Gilbert and Edward P. Heyer; also the assignees of Garret Gil-

bert ; and Mr. Miller put in a separate answer and demurrer. The others answered only.

The demurrers were to so much of the bill as sought to set aside or impeach the will, or to have any discovery or relief in respect thereof, on the ground that the trusts and provisions of the will, or any of them, were inconsistent with the laws of this state.

The answers admitted the general statements contained in the bill, but traversed fully all the charges affecting its due execution, and the testator's competency to make a valid will.

George W. Gilbert, died after his demurrer and answer were filed, without issue, leaving a widow Mary Ann, to whom he devised and bequeathed all his estate, and made her his sole executrix. She afterwards became the wife of George B. Keith, and with her husband, were made parties by a bill of revivor and supplement in March, 1842. Their interests were concurrent with those of the complainants.

The demurrers were brought to a hearing before the Hon. Murray Hoffman, Assistant Vice-Chancellor, who on the 21st day of May, 1842, made a decree overruling the demurrers, in which he declared that William W. Gilbert died intestate as to one sixty-third part of his real and personal estate.

The defendants who had demurred, appealed from this decree to the chancellor, who on the ninth day of September, 1842, affirmed the decree. A further appeal was taken to the court for the correction of errors, where the decree of the chancellor was affirmed in 1843.

The testator's widow, Betsey Gilbert, died in September, 1844, and Clinton Gilbert became her administrator ; and on being made a party as such, he stipulated to abide by her answer. The complainant Charlotte Gilbert, became the wife of H. F. Brayton, and the latter was duly made a complainant in the suit.

It appeared that the testator's widow, was his second wife, and that David, Clinton, Warren and George W. were her children. By his first wife, the testator's children were Garret, Thomas W., Ephraim, Catharine and Elsey ; of whom Thomas

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W. died before the testator, leaving his widow and children as stated in the bill.

After the demurrers were overruled, no further pleadings were interposed by the defendants. The complainants did not attempt to sustain their allegations against the due execution of the will.

The cause came on to be heard on the bill, the answers, the replications thereto, and certain formal proofs; the great controversy being upon the validity of the trusts of the will.

E. Sandford and *S. Stevens*, for the complainants, argued upon the following points.

First. The will of the testator devises his real estate to the trustees named therein, upon specific trusts attached to such estate in their hands. Beyond the trusts to sell for the payment of the debts of the testator, the trusts created by the will are invalid.

I. Because the trust estate is not created for any of the legal purposes of an express trust as authorized by law.

1. The trusts to receive and pay over the rents and profits of real estate, to the persons beneficially interested therein, are void. (*Coster v. Lorillard*, 14 Wend. 265; Opinion of Chief J. Savage, p. 322, 328; of Senator Maison, p. 352; of Senator Young, p. 378; *Hawley v. James*, 16 Wend. 61; Opinion of Bronson, J. p. 156, 161; 1 Rev. Stat. 722, 2d ed. § 55; p. 721, § 45.)

2. The trusts to make partition of the estate, and to sell the lands and convert them into money, for the purpose of making division among the parties entitled to the fund, is not authorized by law.

3. The authority to lease lots for a term of years, and to sell, purchase or exchange slips or gores or other pieces of ground, to enable his executors to manage and benefit the estate given in the 21st and 23d clauses of the will, are not trusts authorized by law, and cannot sustain the trust estate.

2d. The doctrine of equitable conversion is not applicable to the real estate devised by this will, and cannot be invoked to

sustain its trusts and provisions, which are otherwise illegal and void.

Where there is a valid devise of real estate, and a peremptory direction to sell it, a court of equity may deem a sale as having actually taken place, for any legal object, in administering the estate, or executing the will; but it would sanction complete frauds upon and evasions of the statute of uses and trusts, to indulge this fictitious assumption for the express purpose of sustaining a devise, which in other respects is against public policy and prohibited by statute.

SECOND. The trust estate created by the will is void, because it suspends the power of alienation for a longer period than is allowed by law; or if the doctrine of equitable conversion be applied, and the estate held in trust, under the will be regarded as personal property, because the trust suspends the absolute ownership of personal property for a longer period, than during the continuance, and until the termination of two lives in being at the death of the testator.

1. In either view of this point, the interest of the respective *cestuis que trust*, under this will, are inalienable during their several lives. (*Gott v. Cook*, 7 Paige, 521, 536, 538; *De Peyster v. Clendining*, 8 Paige, 309; *Clute v. Beol*, 8 Paige, 85.)

2. The will does not contemplate a sale or disposition of the whole of the real estate, until after the decease of the widow and Ephraim. Four-sevenths of the property devised to Warren Gilbert, George W. Gilbert, Mrs. Fish, and Mrs. Hunt, do not then vest absolutely, but the trust is continued for their several lives with remainders over.

3. The trust is continued, and no final distribution can be made of the estate, until after the determination of six lives in being at the death of the testator; viz, the widow, Ephraim, Mr. Hunt, Mrs. Fish, Warren and George; supposing George and Warren to die without children.

4. If George and Warren die leaving children, the trust appears to be designed to continue as to their portions during the lives of all their children, as in that event interest is directed to be paid to them.

(Under this point, the counsel also cited, 2 Prest. on Abstr. 158,

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159 ; 2 Crompt. & Jer. 334 ; *Ware v. Polhill*, 11 Ves. 257, 283 ; 2 Sugd. on Powers, 492, 496 ; Leigh & Dalz. on Eq. Conv. 48, 49, 54 ; 2 P. Will. 308 ; 5 Madd. 25 ; *Kane v. Gott*, 24 Wend. 641 ; *Van Veghten v. Van Vechten*, 8 Paige, 123.)

The trusts created by the will, should be adjudged to be void, and the decree should declare that the real estate of the testator descended to his heirs at law, free and discharged from all conditions, devises, authority and control of the trustees. The decree should direct an account to be taken, as prayed by the bill.

E. H. Owen, for the assignees of Garret Gilbert, supported the propositions contained in the points next stated.

C. O'Connor and *George Wood*, for the other defendants ; argued in support of the following points.

I. The decisions made upon the demurrer in this cause, do not authoritatively determine that any part of the will of William W. Gilbert was void.

1. The only operative part of Vice-Chancellor Hoffman's decretal order, is the disallowance of the demurrer. It was so held in both the appellate courts.

2. The disallowance of the demurrer was founded, (among others,) upon the ground assumed to be sufficient of itself, that for aught that appeared, there might be an intestacy as to part of the property, by reason of George and Warren Gilbert, or the last survivor of them, dying without children.

3. The demurrer was not well taken, because it was merely a demurrer to an argument advanced in the bill, and not to the whole case stated in the bill, or any substantive part thereof.

II. If this is not so, still the order overruling the demurrer will be sufficiently respected, if this court, in its final decree, declare an intestacy as to any part of the estate however small. The opinion pronounced by Vice-Chancellor Hoffman that an intestacy existed as to a certain proportion, is not binding on the court. (*Methodist Episcopal Church v. Jacques*, 17 Johns. 559.)

III. There is an equitable conversion of the whole estate ; and

the validity of the several limitations contained in the will, must consequently be tested by the rules relating to the creation of estates or interests in personal property. (*Wright v. Methodist Church*, 1 Hoff. R. 202; *Kane v. Gott*, 24 Wend. 641; *Bulkley v. De Peyster*, 26 Wend. 21; *Bunce v. Vandergraft*, 8 Paige, 37; *Laus v. Bennett*, 1 Coxe's Cases, 167.)

IV. Trusts of personal estate, do not like trusts of real estate under the third subdivision of the 55th sec. (Vol. 1, p. 728 of Revised Statutes,) suspend the power of alienation, because,

1. Such trusts are alienable at common law, and are not rendered inalienable by these statutes.

2. The statutory provision is confined in express terms to real estate.

3. Statutory regulations confined expressly to real estate, should not be extended by a forced analogy to personal estate, which is altogether different in its character, properties and uses.

4. The legislature for wise reasons, refrained from fettering with inalienability, trusts of personal estate. (*Kane v. Gott*, 24 Wend. 661, 6.)

V. The rents and profits to be received by the trustees are limited to them in a lawful way, and ought to be sustained, because,

1. They should be deemed personal estate, because merely incidental to the conversion of the real estate into personalty, and going along with it into the same common fund.

2. Supposing they are to be deemed real estate in equity, still they are merely incidental to the express trust to sell, and are not limited under the third, but under the second subdivision of the 55th section.

3. The trustees under the third subdivision, do apply the rents and profits to the use of the *cestui que trust*, by appropriating a portion of them to the purposes of the estate, and paying over the balance to the *cestui que trusts*.

4. That was the common law mode of applying profits to the use of the party entitled to the equitable beneficial interest; and the statutes should be construed as nearly as may be, to the rule and reason of the common law.

5. If applying to the use of the *cestui que trust* should be

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construed to mean the management and application of the funds when converted into personalty, to the support and to the domestic comfort and enjoyment of the *cestui que trusts*; that would be an exercise of guardianship, and not a trust.

6. The design of the act was not to create a guardianship over the person and personal estates arising from rents and profits, but to establish an exclusively active trust, as understood in equity law. (*Gott v. Cook*, 7 Paige, 521, 536.)

VI. All the estates and interests given by the will are alienable, except the contingent remainders expectant upon the termination of the lives of George W. Gilbert and Warren Gilbert.

VII. The share given to Catharine Hunt, out of the third allotted to the widow, with all its ulterior subdivision and limitations, is lawful and ought to be sustained, because,

1. As a trust of personal estate, for the reasons above given, it is not inalienable.

2. As to the shares therein of Warren and George, their alienability is not suspended during the lives of the widow and of Catharine Hunt.

3. The respective life estates of Warren and George, (if allowable,) do not suspend alienation, inasmuch as they are alienable, being personal estate.

4. The remainder to the respective children of Warren and George, suspends alienation during one life only, viz. the life of Warren and of George, respectively, upon the termination of which the children to take their shares respectively, will be ascertained, and in a condition to alienate.

VIII. The absolute ownership or absolute power of alienation, is consequently not suspended as to any part of the estate, for a longer period than during the continuance of the two specified lives of George W. and Warren Gilbert; and at their termination, such suspense must inevitably cease.

IX. If the 17th section of the title concerning estates in land, has no application to a case where the ultimate remainder may still be contingent at the expiration of the second successive life estate, then there is no objection to any number of successive life estates, provided the ultimate remainder be so limited that it

must vest at or before the expiration of some two certain specified lives.

X. If the 17th section does apply to *all* cases of successive estates for life, but is only inoperative as to such contingent remainders in failing to accelerate their vesting, then every third and subsequent successive life estate given in any share of the property, is void ; and the income, (if any there shall happen to be,) accruing during the term of such intended third and subsequent life estate, is undisposed of by the will, and must pass as in case of intestacy, to the heirs at law or next of kin of the decedent.

XI. The discretionary powers given to the executors, as to paying interest on legacies, making a final distribution, &c., do not suspend alienation, inasmuch as every absolute owner of property ought, and is presumed to exercise a similar discretion ; and delay under the exercise of discretion, is not a suspension, within the meaning of the law. (*Van Vechten v. Van Veghten*, 8 Paige, 122, 3.)

XII. The power of leasing in section 21st of the will, is valid as a power in trust, and inasmuch as such lessees can join in alienation, the power to alienate is not thereby suspended. So of the power to exchange. (*Hawley v. King*, 7 Paige, 445.)

THE ASSISTANT VICE-CHANCELLOR.—The late assistant vice-chancellor decided upon the demurrer in this cause, that the trusts of the will of William W. Gilbert, were void as to one sixty-third part of the mass of his estate. The particular shares which were held void, were the one-sixth of one-seventh of the third part, in which the widow was vested with a life interest, which fraction was to devolve upon George Gilbert for life, (after a second life interest in the seventh part to Mrs. Hunt,) with remainder to his children, and a like fraction of the same seventh part, which was limited in the same manner, to Warren Gilbert and his family. In these fractions, each one hundred and twenty-sixth part of the estate, it was adjudged that the will suspended the absolute ownership of the property, (treating it as personal estate,) beyond the period limited by law.

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The chancellor affirmed the decision in its fullest extent, and his decree was affirmed by the court for the correction of errors.

These decrees establish, as the law of the case, that the trusts of the will are void, to the extent of the two fractions before mentioned.

The opinions delivered in the court for the correction of errors, are so irreconcilable with each other, (although all concurring in the affirmance,) that it is impossible to say on what specific ground that court proceeded. The chancellor held the trusts to be void to the extent stated, without considering the question whether the real estate was to be deemed converted at the death of the testator. The assistant vice-chancellor held that there was an equitable conversion from that date; but, following as he did, the chancellor's doctrine as to trusts of personal property, it was not necessary for him to decide the question of conversion.

Thus I have no guide in the examination of the remaining trusts of the will, from the adjudications upon the demurrer, beyond the opinion of the chancellor.

It was argued at the hearing, with equal ingenuity and force of reasoning, that future interests in trusts of personal property, are not subject to the provision of the statute of Uses and Trusts, which makes trust interests in lands inalienable. (1 R. S. 729, § 63.) And it was contended, that the various opinions to that effect which have been pronounced by judges in the court for the correction of errors, if they have not established the position, have, at least, left it an open question.

This is indisputably, a very important, if not a controlling point, in the construction of the will now before me, and I will at once state my views on the subject.

The court of last resort has never decided that future interests in trusts of personal property, are not within the provision of the statute to which I have referred. On the contrary, it is difficult to perceive how that court could have affirmed the decrees of the chancellor in some of the cases, where he held that such interests were not alienable, without sustaining that doctrine.

But, conceding that the question is still open in our highest court, it is clearly and firmly established by the learned head of the court of chancery, by whose judgments I must be governed,

that trusts of future or contingent interests in personal property, are subject to the sixty-third section of the statute relative to Uses and Trusts. Such was his opinion on the demurrer in this cause, and he so decided in *Hone v. Van Schuick*, 7 Paige, 221, 233; *Gott v. Cook*, 7 ibid. 521, 535; *Clute v. Bool*, 8 ibid. 83; and *De Peyster v. Clendening*, 8 ibid. 295, 305.

The whole property of William W. Gilbert is devised and bequeathed in trust. All of the interests which the will carves out of the third part of the estate, which was given to his widow for life, and which are to take effect after her death, are *future interests*, and many of those in the other two thirds, upon which it will be my duty to comment, are *contingent interests*. It is, therefore, unnecessary, in respect of the effect of those limitations, for me to decide whether the real estate was converted into personally upon the testator's death, or not till a subsequent period.

In my estimation, it is, nevertheless, material to ascertain whether the interest given to the widow by the will is real estate, or whether it may be regarded as personal property from the time that the will became operative. I will therefore, in the first place, examine that question.

So far as it was necessary to sell real estate for the payment of debts, the will directs an immediate sale, and the conversion to that extent is unquestionable.

The fourteenth section directs sufficient sales *to make the specific investments* enjoined by the will, and to pay the legacies with as little delay as possible, having a regard always for the interest of the whole estate.

To this extent also, an equitable conversion may probably be deemed to have taken place. But I do not understand this clause as applying to the bequests of the mass of the estate, contained in the fifteenth section, nor to the provision for the widow.

By the eleventh section, the widow was to receive from the trustees, one third of the net amount of the rents and profits of the real estate, *while it remained unsold*.

Under the twelfth section, the trustees, in their discretion, could undoubtedly have sold the whole of the real estate within a year after the testator's death, and thus turned the widow's third of the rents into a third of the interest of the purchase money;

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and he evidently expected that a partial sale would be made while she lived. But I do not discover in the will, any ground upon which she could ever compel the trustees to sell the lands for the purposes of her income; and it is at least doubtful, whether those entitled under the fifteenth section, could compel a sale by the trustees, until the period appointed for the final distribution. It is clear, as to the widow, that the discretion vested in the executors was beyond her control; nor could this court interfere to coerce their discretion in her behalf. (See *Bunner v. Storm*, 1 Sandford's Ch. R. 357.)

Her interest was devised to her *as the income of real estate*, and it might continue such during her whole life. If its character were changed by a sale, and it from thence became the income of personal property, such change could not have relation back to the testator's death, so as to give to the whole interest the quality of personalty from that time. It is only an imperative intent to convert, bearing upon the particular interest as to which the question arises, which can have that effect.

Taken by itself, therefore, I do not think that the widow's interest under the will, can be regarded as converted into personal estate from the death of the testator.

Assuming, for the argument, that the shares of those who were to take the bulk of the estate under the fifteenth section, ought to be regarded as personalty from his death; so that on the death of David Gilbert, for example, during the widow's lifetime, his next of kin, and not his heirs, would have taken his seventh part; does that affect the question as to the conversion of the widow's life interest in the rents of the third part of the lands?

For the final distribution of his estate, the testator contemplated that all his lands should be turned into money, and that his children and descendants, taking under that distribution, should receive money and securities, and not real estate. But to establish an entire equitable conversion, there must be a design to give to the produce of real estate, the quality of personalty, *to all intents*. This is the rule stated by Mr. Cox, in his note to *Cruse v. Barley*, (3 P. Will. 22,) and it is adopted in all the subsequent authorities.

There was no conversion *for all purposes*, by this will. For

if David Gilbert had died in his father's lifetime, the seventh part given to him would have gone to the heirs at law, and not to the next of kin of the testator. (*Ackroyd v. Smithson*, 1 Bro. Ch. C. 503; *Wood v. Cone*, 7 Paige, 472.) And, as I have shown, the testator, so far from impressing the quality of personalty on this provision for his widow, gave it to her as realty, and so devised the estate out of which it was to issue, that it must continue to be realty to the end of her life, unless its character should be changed by the exercise of the unlimited discretion of the trustees.

Thus, it may be that the testator has converted the real estate out and out, as to the quality of the property which his children are to take under the fifteenth section of the will; while he has made no conversion in the quality of that which he gave to his widow.

He has, at the most, authorized his trustees to convert the latter, but he has not required it. This discretionary power, no more affects the quality of her estate in the lands remaining after the payment of the debts and legacies, and making the specific investments, than it would have done were it expressly restricted in its exercise until after her death.

I think that the question of conversion, as to the widow's interest, is unaffected by the point as to the conversion of the subsequent trust interests, and must be considered by itself. Thus regarding it, the provision made by the will for her income, must be deemed, at the death of the testator, as a trust in real estate.

The validity of the trusts, depends upon their effect and character when the will became operative, and in my examination of those trusts I must, therefore, treat the widow's interest as realty, and not as personal property. I will now proceed to consider the effect of those trusts in the will, which were brought to my notice at the hearing.

FIRST. Following the course of the third part of the estate, the rents and income of which were given to the widow, through the devolutions prescribed by the will. As a trust interest in lands, her right to the income was inalienable at the death of the testator.

The third part, was therefore effectually locked up during her

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life. Advancing to the time when a part of the lands was converted, the interest of the widow in the income of the proceeds, must be treated as an interest in personal property, which was future or expectant at the testator's death, and equally incapable of alienation.

Upon the death of the widow, this third part of the estate became divisible into seven equal portions, and Mrs. Hunt, Mrs. Fish, George Gilbert, and Warren Gilbert, were each to enjoy one of those portions.

I will first take up Mrs. Hunt's seventh part. By the sixteenth section of the will, she was to have the interest until her death or re-marriage; the whole seventh being still held in trust. On either of those events, the fund, (\$5000 of her whole seventh excepted,) by the seventeenth section was to be divided between the other six children there named; but the share of Mrs. Fish goes to her for life only; and George and Warren take life interests in their shares also, with subsequent limitations which need not be mentioned in this connection.

Thus, as to three sixth parts of the share of Mrs. Hunt in the widow's third of the estate, if all the bequests are to be enjoyed, there is a suspense of the absolute ownership of the fund for three lives which were in being at the testator's death. In other words, so long as either the widow, or Mrs. Hunt, or Mrs. Fish lived, an absolute title to the latter's proportion of the third part, derived through Mrs. Hunt, could not be conveyed or transferred, though every person mentioned or referred to in the will, should join in the transfer.

And the same thing is true of the portion of Warren and George, derived in the same manner. It is no answer to the argument, to say that Mrs. Fish, or Warren, or George, might die before Mrs. Hunt's death or re-marriage; or that Mrs. Hunt might die before the widow. The limitation is illegal if it *may* contravene the statute; it is not necessary for the party impeaching it, to show that it *must* have that effect.

The chancellor's opinion, when this cause was before him on the demurrer, shows that the provision of the revised statutes, which, when more than two successive estates for life are limited, cuts off those beyond the two first, (1 R. S. 723, § 17,) does

not relieve the case from this difficulty, in respect of these portions derived to Warren and George. If their life estates were rejected for the excess, the absolute ownership would still remain in suspense during their respective lives, because until their deaths, it could not be known who was to succeed to those portions. It is clear, therefore, that these portions, intended for George and Warren, being each an one hundred and twenty-sixth part of the mass of the estate, fall within the prohibition of the statute, and the trusts thereof attempted to be created by the will, are void.

This was decided on the demurrer, and I have gone briefly through the argument, as an introduction to the discussion of the remaining trusts.

As to the one hundred and twenty-sixth part limited to Mrs. Fish, arising from Mrs. Hunt's share of the third of the estate, the life interest given to Mrs. Fish may be stricken out, pursuant to the seventeenth section of the statute relative to the creation and division of estates before cited; and then the question remains, upon the limitation over, "*to her lawful heirs*," according to the laws of this state, in cases of intestacy," as applicable to her "*children and heirs*." The use of both *children* and *heirs*, indicates that the testator did not overlook the distinction between the two terms. Mrs. Fish could have no *heirs*, (properly so called,) while living, and her children living at the date of the will, or at the testator's death, might never become her heirs. Construing this part of the 16th clause of the will, with the aid of the kindred language in the 17th clause, I think, by "*lawful heirs of Mrs. Fish*," the testator intended those persons, her children and grand-children, who should be her heirs at her decease. (*Bowers v. Porter*, 4 Pick. 198.) Upon this construction, there is the same difficulty that exists in respect of the shares of George and Warren already discussed. It cannot be known while Mrs. Fish lives, who will be entitled to this one hundred and twenty-sixth part as her heirs, and the absolute ownership is therefore suspended during her life, as effectually as if the bequest of the interest to her for life were valid and operative.

Next, pursuing the application of the principles already stated

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as to Mrs. Hunt's share of the third of the estate, let us take Warren and George's seventh parts of the same.

Each has a life interest in the income. This, with that of the widow, exhausts two lives. If either shall die without children living, his share becomes divisible into four parts, (or three, if the survivor of the two leaves no children.) The survivor then takes a life interest in one-fourth of the other's share; and until he dies, (though his life interest be void,) it cannot be known upon whom that fourth will ultimately devolve. Suppose George were to die first without children. Then Warren, by the terms of the will, is to succeed to the income of one-fourth, (that is, of one eighty-fourth of the whole estate,) for his life. This is void for excess, it being the third successive life estate. But the absolute ownership of this fraction is suspended, until his death shall demonstrate who is to take the succession. It follows that, in respect of this one eighty-fourth part, the trusts of the will are invalid.

If Warren should die without children, leaving George surviving, the same state of things would exist as to another one eighty-fourth part of the estate. Both of these contingencies could not occur, but one of them was as likely to occur as the other, at the death of the testator, and the one would affect a different portion of the estate from that subject to be influenced by the other.

SECOND. This case is presented in another aspect, which, if I have viewed it correctly, has a far more extensive bearing upon the trust interests created by the will.

The seventh clause of the will provides a fund of \$3000, the income of which is to be paid to Ephraim, quarter yearly, during the full end and term of his natural life. The fifteenth clause, which is the only one directing a division of the *corpus* of the estate, in express terms brings this fund of \$3000, as well as the fund set apart for the use of the widow for life, into the estimate, account, and distribution. The conclusion appears to be inevitable, that no general distribution was contemplated by the testator until after the death of both the widow and Ephraim. This is confirmed, by the fact that all the provisions of the will,

as to the several seventh parts in which the estate is given, upon the division prescribed in the fifteenth section, are consequent upon, and follow such division. These separate seventh parts, come into being for the first time, on the general distribution, and no one of the children could require the trustees to assign to him his seventh part, or deliver over to him any portion of the capital of the estate, whether in lands or personalty, upon or towards his seventh part, until after the death of the widow and Ephraim. In order to avoid a collision with the statute against perpetuities, the respective interests in the distribution should vest absolutely upon the death of those two persons. But such is not the effect of the will. On the final distribution, four of the seven parts are to remain in trust.

First. Mrs. Hunt is to have a life interest in one seventh, determinable sooner, on her re-marriage.

Assuming, for the present, that Ephraim's right in the \$3000, was not a future interest, and, being personalty, was alienable, and that his life is not to be counted; Mrs. Hunt's interest was undoubtedly expectant; and following upon the life estate of the widow, at least two lives must have worn out before her interest would cease. Her seventh should then vest absolutely at all events. Instead of which, three sixth parts of it are again given over for life, to Mrs. Fish, George, and Warren, and until those lives drop, the persons ultimately entitled, cannot be ascertained. This, as I have before stated, is the necessary consequence, even if their several life interests be rejected as void.

Thus in one-half of Mrs. Hunt's share, or in one-fourteenth of the bulk of the estate, the absolute ownership is suspended beyond the limit permitted by law.

So far, I have gone on the assumption that Ephraim's life might be left out, in estimating the suspension of the absolute ownership. But can his life be thus omitted? Suppose that Warren Gilbert had died, leaving children, soon after the testator, and while the widow and Ephraim were living: Could an absolute interest in Warren's one-seventh of the estate, have been conveyed to a purchaser at that time? It could not be done, because the trustees would be indispensable parties to the transfer, and it would be a palpable violation of their trust, to divide

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off one-seventh of the estate, while Ephraim or the widow survived. It follows, that Ephraim's life must enter into the computation, in determining how long these various provisions suspend the absolute ownership. This brings the whole of Mrs. Hunt's seventh part, within the prohibition of the statute. For Mrs. Hunt's life is the third in the series, and it cannot be rejected, as in some of the instances heretofore mentioned, because it is not the third life estate or interest. In the widow's third, it stands as the second life interest in succession; as to the other two-thirds of her seventh, it is the first. My conclusion is, that the trusts as to the whole of Mrs. Hunt's seventh part, are void.

The objections to the seventh parts of Mrs. Fish, Warren, and George, are still more forcible. In each, there is a life interest, which though not farther removed than the second in succession, is the third in the series of lives during which the ownership is suspended; and, in addition, the persons who are to take, upon the termination of their lives respectively, cannot be known while they live.

It will be observed, that, in this review of the provisions of the will, I have treated them as if the real estate were to be deemed converted at the death of the testator, with the single exception of the devise of the rents to the widow. Whether that be the proper era, or whether the general conversion relates to the death of the widow and Ephraim, or the survivor of them, I have not examined, and express no opinion.

But applying the principles settled in this court to this will, on the most careful consideration which I can give to the subject, I am compelled to say, that in my judgment, the limitations of the will are void, as to four sevenths of the property disposed of by the fifteenth and subsequent sections.

Upon this conclusion, it is needless to look into the minor points raised against the other parts of the will.

The trusts being so far void as to overturn the main design of the testator, the overthrow of the residue would follow as a matter of course, even if the trust interests; which, if standing alone, might have been sustained; were not involved in the fate of the void trust devise to the executors. (See *Coster v. Lorillard*, 14 Wend. 265.)

The purposes for which the trustees were to sell and receive the interim rents, aside from the legacies to the children, and the general distribution, have been accomplished long since; and there is nothing in the way of declaring, that subject to those purposes and the exercise of the power given therefor, the real estate descended to the heirs at law, and that the next of kin were entitled to the personal property of the testator.

Of the specific legacies, that to Mrs. Jane Gilbert is distinct from the void trusts, and her receipt of it is not inconsistent with the breaking up of the will at large. But the legacies to her daughters, must be relinquished upon their coming in as heirs and next of kin. (*Hawley v. James*, 16 Wend. 62; *Thompson v. Carmichael's Executors*, 1 Sand. Ch. R. 387.)

I have concluded, with some hesitation, that the legacies given by the sixth section of the will, must also fail. They are payable out of the sales of the real and personal property. The parties are all to take as heirs, on avoiding the trusts, and must therefore waive the legacies. Besides, so far as they are to be made out of the real estate, they are dependent on the void trust, and two of them form a part of the subordinate trusts which cannot be sustained. The devise cannot be maintained as a power in trust, in respect of these legacies, if it be void as an express trust. (*Hawley v. James*, 16 Wend. 174, 175, per Bronson, J.; 1 R. S. 728, §§ 55, 58.)

The acts of the trustees under the will, should be confirmed, and in the account to be taken, they should have all just allowances, including compensation for their services. The valid powers of sale, were probably sufficient for the protection of *bona fide* purchasers. The payments made upon the legacies or bequests which are avoided, may be adjusted between the respective heirs in the account. The case of *Hawley v. James*, (16 Wend. 62, 182, 274, 278,) furnishes a precedent for the proper decree, in this and many other particulars.

There must be a decree declaring these principles, and directing the trustees to account before a master. The complainants costs throughout, and the costs of the other parties in the suit while pending in this circuit, are to be paid out of the estate.

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On recurring to the answers, I find that the want of parties is set up by way of demurrer. No point of this kind was made at the hearing, but it is manifest that there should be other parties brought in, before an effective decree can be entered. The administrators of Ephraim Gilbert, Mrs. Hunt, and Antoinette Gilbert, respectively, are necessary parties. The bill states that the two former died without issue, and it shows that the heirs of all three are parties. It should also appear that they died intestate.

A supplemental bill may be filed to remedy these omissions.

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WHERE a defence of usury is interposed to the foreclosure of a mortgage, by the purchaser of the equity of redemption, the complainant cannot overcome it by proof that the lands were conveyed subject to the mortgage, unless his bill sets forth the execution and terms of such conveyance.

Application was made to D. for a loan to be obtained from his father-in-law H. D. negotiated the loan for \$2600, and on taking the mortgage, gave his notes for \$600, of the amount; but the loan was all advanced by H., to whom the mortgage was given. D. took a mortgage to himself for \$300, for his trouble in doing the business. In a suit by H. to foreclose his mortgage; *Held*, that D. was a competent witness for H.

Application for a loan was made by parties in Western New York, to D. in New Jersey, they expecting D. to obtain the same from H., or some other person there. They offered to give D. \$300, for doing the business and delivering them the money. D. obtained the loan of his father-in-law, H., took the money to the parties in Western N. Y., received their mortgage to H. for the loan payable with interest, and took a mortgage to himself for the \$300.

Held, 1. That D. was the agent of the borrowers, and not of the lender, in negotiating the loan.

2. That after the loan was agreed upon, he was the agent of both, in perfecting it and taking the mortgage therefor.

3. That the lender was not affected by the agreement of the borrowers to compensate D., and that the mortgage to the lender was not usurious.

In the defence of usury, the proof must strictly sustain the allegation made in pleading. So where in an answer, the usurious agreement was stated to be, that H. was to advance the borrowers \$2000, and D. was to give them his notes, one

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for \$150, and one for \$450, making the \$2600, for which the security was given; and the proof showed an agreement by which H. was to advance \$2052, in cash, and \$548, in the notes of D., one for \$414, and the other for \$148; it was held a fatal variance.

March, 7; May 27, 1846.

THIS was a bill to foreclose a mortgage for \$2600, on lands in East Bloomfield, in the county of Ontario, dated April 1, 1840, and executed by Morris Newton and Darius Newton, to the complainant. Amanda Newton was made a defendant, as having some title or interest, to or in the equity of redemption. The testimony showed that the lands were conveyed to her, subject to the mortgage.

The Newton's put in an answer, stating that in the spring of 1839, M. and D. Newton applied to one Harvey Dayton, a son-in-law of the complainant, (the two latter residing in New Jersey,) for a loan of \$2000, or \$2500, offering to him all his expenses and an extra compensation of \$300, beyond the legal interest, for the use of the money. That in the winter of 1840, the negotiation was renewed, and the complainant assented to the terms proposed; upon which Dayton in his behalf, came to East Bloomfield with \$2000: That they wanted \$2600, and Dayton proposed to furnish the \$600, out of his own funds. And that finally it was agreed between them and Dayton, that the complainant should advance the \$2000; Dayton should give them his two notes, one for \$450, and the other for \$150; the Newton's should secure the aggregate, \$2600, by their mortgage on the lands in question, bearing interest at seven per cent.; and that they should execute another mortgage to Dayton for \$300, on a village lot in Seneca Falls, for the usurious interest or compensation stipulated for the loan of the \$2600.

The answer then set forth the execution of this agreement on both sides, and it insisted that the mortgage for \$2600, was usurious and void.

Issue being joined on this answer, both parties proceeded to take testimony. Dayton was produced as a witness by the complainant, and was objected to by the defendants, on the ground that he was interested in the event of the suit. The facts upon which the objection turned, will be found in the opinion of the

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court. His testimony was taken, subject to the question as to its admissibility.

There were several witnesses examined in respect of the alleged usury, and the testimony was in some degree conflicting. It is deemed unnecessary to state it in detail, and the summary in the opinion delivered, will suffice for a proper understanding of the points decided.

J. R. Van Rensselaer, for the complainant.

E. Foote Jr., for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—The deed to Amanda Newton, which would probably preclude her from the defence of usury set up in the answer, is not admissible under the pleadings, for any other purpose than to show that she has an interest or claim in the equity of redemption. The complainant to avail himself of the deed, against the attempted defence, should have set forth the pretence of usury, and charged the execution of the conveyance to Amanda Newton subject to the mortgage, and her assumption to pay it.

The first great struggle on the part of the defendants, is to exclude the testimony of Harvey Dayton, on the ground of interest in the event of the suit.

1. It is argued from the evidence of Cory, that a part of the \$2000 loaned in cash, belonged to Dayton.

The manner in which this witness connected Dayton's conversations with the loan to Newton, does not appear satisfactory to me. He states that his own application for money, was after Hetfield sold his farm, and that it was two or three years prior to his examination, which would bring it in 1842 or 1843. The loan to Newton was consummated the first of April, 1840, and on the defendants hypothesis, was in negotiation nearly a year before. The conversations related by Cory, undoubtedly had reference to the money Hetfield received for his farm.

On his first examination Cory could not tell to whom Dayton said the money went, nor whether he stated the person's residence. Even when a leading question was put, with Newton's

name at full length, Cory was unable to answer. When a leading question as to the place was put, he came up to that point so far as to say it was in Western New York. On being recalled, after a few day's interval, he not only recollected Newton's name, but associated Dayton's conversations with the name of Newton, as if the two things had never been dissevered in his mind.

Considering the great discrepancy as to the time, the manner in which the witness's recollection was obviously screwed up to the point, the statement in the answer and the virtual concession throughout the residue of the defendants proof, that the \$2000, at all events, belonged to Hetfield ; I must say that Cory's testimony does not make out Dayton's interest in any part of that sum.

2. It is next said, that \$600 of the sum in the mortgage, was furnished by Dayton, and belongs to him.

The \$600 is in fact \$548, and for that amount Dayton gave his notes to Newton. He said he would pay them, and the notes were paid, and the receipt shows presumptively, that Dayton paid the note of \$148.

On the other hand, the mortgage, given to Hetfield alone, and acknowledging the whole consideration as proceeding from him, is a circumstance of weight. And I think the defendants have proved by Ira R. Peck, in the admissions of Hetfield which they called out to show Dayton's agency, that Hetfield furnished money to the full amount of the mortgage.

In considering the question of Dayton's interest, his own testimony is of course to be left out of view ; as the point must be determined on the evidence upon which the objection was made to his examination. Some other circumstances bearing upon his interest, will be noticed in examining the case on the merits. It is sufficient to say here, that the defendants have not made out his interest in the \$600, so clearly as to exclude him for that cause.

3. The last ground of objection, is Dayton's avowed ownership of the mortgage for \$300, which mortgage, it is said, must stand or fall by the result of this suit.

I do not perceive how this suit is to affect it at all. If Dayton seeks to enforce it, a decree in Hetfield's favor in this suit will

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not interfere with the defence of usury or extortion to that mortgage. Nor will a decree in this suit in Newton's favor, be a bar to Dayton's foreclosure.

My conclusion is, that Dayton is a competent witness. As to his credit, it may be observed that all the material witnesses on both sides, except Cory, are near relatives of the respective parties, or intimately connected by their present or former domestic relations. And Cory at one time had an unpleasant altercation with Dayton. Thus the testimony of all, demands a close and careful scrutiny.

On the merits of the case, the first thing that occurs upon the defence, is a variance between the usurious contract alleged, and that which is claimed to have been proved. The answer, after stating a proposal by the Newton's for a loan \$2000 or \$2500, at seven per cent. interest, and they giving in addition \$300, secured by a separate mortgage, and the complainant's assent to those terms; proceeds to set forth that Dayton came with \$2000, that they wanted \$2600, and he proposed to furnish the \$600 from his own funds. And the final agreement as stated in the answer, is that the complainant was to advance \$2000, Dayton was to give two notes, one of \$450, and the other of \$150; and the Newton's were to secure the \$2600 by the mortgage in question, bearing lawful interest, and to execute another mortgage for \$300, for the usurious interest. Now the evidence does not sustain this statement in any of its particulars. If the \$2600 be regarded, aside from the notes given by Dayton, the proof is clear that Hetfield agreed to loan and did loan the whole of it; and that although Dayton's notes were given for a part, (but not for \$600,) he did not pay any portion of the amount. If the agreement be considered with reference to its minor stipulations, then it is proved that Hetfield was to make the whole loan, \$2052 in cash on the delivery of the mortgage, and \$548 in Dayton's two notes, one for \$414, at six months, and the other for \$148.

In this court, as well as at law, the proof of usury must strictly sustain the allegation in pleading. Any variance in its substantial terms, is held to be fatal. (*Vroom v. Ditmars*, 4 Paige, 526; *New Orleans Gas Light and Banking Co. v. Dudley*, 8 *ibid.* 452; *Smith v. Bush*, 8 Johns. 84.) Under these authorities,

I have no doubt that the variance in this case is material, and is fatal to the defence.

I have nevertheless considered the testimony in the cause, and will briefly state my conclusions.

The important question as to the usury is this: Was Dayton the agent of Hetfield in negotiating the loan, or was he the agent of the Newton's?

The amount which he claimed and secured as his compensation, is not very material in this respect. If he were Newton's agent, the exorbitance of his charges is nothing to Hetfield. If he were Hetfield's agent, he had no right to make any charge against the Newton's for his services.

Notwithstanding Dayton's liberal use of the pronouns, *I* and *we*, in his conversations about this affair, it is very evident that the Newton's did not expect him to make them a loan. He told them distinctly, on their first application, that he had no money to let, and there is no proof in the case that he had any, either in 1839 or 1840. He at the same time told them that Hetfield had money, and he thought he could make an arrangement for them with Hetfield. But in this he was mistaken, and the sale of the mortgage, which the Newton's proposed to make to raise money in 1839, was made elsewhere, and that negotiation dropped.

Newton's letter of January 18th, 1840, in connection with the previous transactions, is conclusive that he expected Dayton to obtain the money from Hetfield or some other person, and that he did not look to Dayton at all, as the lender of the money. He proposed the same terms as he had offered on the prior negotiation, viz: interest at seven per cent.; and he also offered to give to Dayton a mortgage of \$300, to compensate him for doing the business. A letter of Dayton's, in answer to this, dated February 26th, 1840, is not produced, and the omission is a strong point against the defendants, on this important part of the case. It probably contained the distinct exposition of Dayton's true position in this matter of agency.

Pausing at this stage of the case, we find Newton desiring a loan, applying to Dayton, who had no money, to procure it for him at seven per cent., and offering for his services, a bonus or

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commission of \$300. This was clearly an agency for Newton. It was of no consequence to him whether Dayton procured the loan from Hetfield, or from John Doe.

To proceed, Dayton applied to Hetfield, and procured it from him. He applied at Newton's request. He did not ask Newton in behalf of Hetfield, to accept a loan. The difference of one per cent. between New York and New Jersey interest, was an obvious inducement to Hetfield to make the loan. Unless Dayton is perjured, Hetfield knew nothing about the \$300 proposed to be given to Dayton, and Hetfield's assertion to that effect made to Peck, which the defendants proved, corroborates the testimony of Dayton. Up to the time that Hetfield consented to make the loan, Dayton was the agent of the Newton's beyond all doubt. From that time, until it was completed, he continued to be Newton's agent to effect it, and he was also Hetfield's agent to transmit the money, and receive and look to the security. But in the controlling feature of the case, the negotiation for the loan, he was in no respect the agent of Hetfield. He was acting for the Newton's, and Hetfield was acting and bargaining for himself.

This is my conviction upon the evidence, and if I am right in this conclusion, the principle of the cases of *Dagnall v. Wigley*, (11 East, 43 ;) *Coster v. Dilworth*, (8 Cowen, 299 ;) and *Crane v. Hubbell*, (7 Paige, 413 ;) is decisive against the defence.

In *Reed v. Smith*, (reported in 9 Cowen, 647,) though decided nearly five years before *Coster v. Dilworth*, it was palpable that the plaintiff was the actual lender of the money. The court dwelt upon the fact that the note never went out of his possession, and he negotiated the renewals and every part of the transaction. To make this case analogous to *Smith v. Reed*, the defendants should have set up that Dayton was in truth the lender of the money, and that the use of Hetfield's name was colorable throughout.

On the defence attempted by the proofs, as well as upon the point of variance, the complainant is entitled to a decree.

The principal sum being now due, the decree may be for a reference to compute the amount due, and for a sale on the confirmation of the master's report.

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It is no objection to a bill of interpleader, that the complainant has an interest in respect of other property not in the suit but which might be litigated, that one party rather than the other should succeed in the interpleader, so as to increase his own chance of success, in respect of such other property. Such interest may be termed an interest in the question, but not in the particular suit, and does not prevent him from filing an interpleader.

If however the complainant be liable to either party *in respect of the specific fund in dispute, beyond the question of property*, or make claims on the fund which either of the defendants contests, it is not a proper case for an interpleader.

J. having placed goods in the hands of O., as a security for advances, obtained the goods on a promise of other indemnity, and departed from New York to go to Liverpool, on the 11th of March, 1841, in the steamship President. Nothing was ever heard of the ship or of any person who sailed in her, after she left the harbor of New York. In April, and again in May, 1841, J.'s Attorney placed securities in the hands of O. for the promised indemnity, and directed O. to pay the surplus to W., to whom J. was largely indebted; to which O. agreed. In August, 1841, administration was granted on J.'s estate. There being a surplus it was claimed from O. by W., and by the administrator of J., and each sued O. at law for the same. The administrator did not question O's right to the indemnity.

Held, 1. That it was a proper case for a bill of interpleader by O. against the rival claimants; and that he was under no personal obligation to W., which prevented his resorting to that remedy.

2. That J. is presumed to have been lost at sea, before May, 1841; and the powers of his attorney were thereby terminated.

3. That the administrator was entitled to the surplus.

Facts, which are a part of the experience and common knowledge of the day, are legitimate grounds for the judgment of the court. This principle applied to the usual duration of voyages across the Atlantic, by steam and other packet ships.

May, 12; May 30, 1846.

IN November, 1840, the complainant lent his notes for \$3,100, to Joseph Leo Wolf, which the latter agreed to protect; and for that purpose he lodged merchandize with the complainant. This was subsequently relinquished on an agreement of indemnity in some other mode; but before completing it, J. Leo Wolf

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departed from New York for Liverpool, in the steamship *President*, on the 11th of March, 1841. This vessel and her ill fated passengers and crew, as it is well known, have never been heard of since her departure from this port.

In April, 1841, Louis Leo Wolf, who was the general attorney in fact of Joseph, delivered to the complainant, securities belonging to Joseph, for the indemnity agreed upon by Joseph against the advances made by the complainant to take up the notes; and in May, 1841, Louis transferred to him additional securities for the same purpose. On delivering the latter, the attorney directed the complainant to pay over the surplus, if any there were to William Leo Wolf, who was a large creditor of Joseph, and the complainant assented to make such payment.

On the 25th day of August, 1841, on proof of the facts relative to Joseph Leo Wolf's supposed death, letters of administration on his estate were granted to the public administrator in the city of New York.

There was a considerable surplus, arising from the securities transferred to the complainant, after indemnifying him; and in September or October, 1841, William Leo Wolf formally claimed such surplus from the complainant, and a like claim was made about the same time by the public administrator. Both commenced suits at law against the complainant, to recover the surplus; upon which the latter filed a bill of interpleader, paid the surplus into court, and obtained an injunction, staying the suits at law.

The administrator, in his answer, admitted the complainant's right to hold the securities, to the extent of his advances; and insisted that Joseph Leo Wolf died within a few days after the 11th of March, 1841, whereby the authority to Louis, his attorney, expired: That the attorney's direction to pay the surplus to William, was thus rendered nugatory; and the administrator claimed it as a part of Joseph's assets.

William Leo Wolf put in an answer, alleging the validity of the direction given by Louis, and insisting that the complainant, on receiving the securities, was bound by his agreement with Louis, to pay the surplus to William. He also insisted that there was no presumption of Joseph's death, prior to the transfer in

May, 1841, and the direction then given in William's favor. If there were any such presumption, then the complainant took nothing by the transfer of the securities after Joseph's death, and is liable to the public administrator for the whole securities. And on this ground, as well as the complainant's liability to William under the agreement to pay him the surplus; William insisted that the bill of interpleader could not be sustained.

F. Griffin, for the complainant.

N. Chase, for W. Leo Wolf.

J. B. Haskin, for the Public Administrator.

THE ASSISTANT VICE-CHANCELLOR.—Neither of the defendants, questions the position that the fund in dispute came rightfully into hands of the complainant. Nevertheless the defendant Leo Wolf contends, that the facts upon which the administrator claims the fund, if made out, will entitle him to recover from the complainant the whole amount of the original deposit of securities. I do not think that this is a necessary consequence from the case made by the administrator. It suffices to defeat W. Leo Wolf's claim to the fund, as between him and the administrator, to prove that Joseph Leo Wolf died before May, 1841. But the complainant's right to the securities, to the extent of indemnifying him for his advances for Joseph, may have been valid under the original agreement for indemnity, or he may be entitled to be subrogated to the securities in place of the merchandize which was delivered up. The answer of the administrator is consistent with such a subrogation, or with a valid substitution of the securities for the merchandize. And it is a concession of the complainant's right to indemnity out of those securities, which is binding upon the administrator.

Of course, W. Leo Wolf cannot set up, to defeat this interpleader, the existence of a demand in favor of the administrator, which the latter disclaims.

The judgment of Lord Cottenham in *Crawshay v. Thornton*, (2 M. & Cr. 1, 19,) cited by the defendant Leo Wolf, refers to

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liabilities of the complainant, beyond the mere question of property in *the specific fund in dispute*. He did not intend to say that because the complainant, in respect of other property which was not then in contest, had an interest that one defendant should succeed rather than the other, in order to establish or promote his own chance of success when a contest should arise as to such other property; therefore he could not file a bill of interpleader as to property in which both parties defendant conceded that he had no interest. A suit concerning the latter could have no influence upon the questions in respect of the property first mentioned. An illustration of Lord Cottenham's meaning is to be found in the instance of the acceptor of a bill of exchange, discussed in *Atkinson v. Manks*, (1 Cowen, 692,) where the bill being drawn in favor of B., one C. claimed the fund in the acceptor's hands. There the acceptor was under a personal obligation to B., beyond and independent of the question as to the right to the fund.

In *Mitchell v. Hayne*, (2 S. & S. 63,) also cited, the complainant claimed against both of the defendants, a right in the fund in contest, which was resisted by one of the defendants. It was therefore held that he had a personal question to maintain with one of the defendants, which precluded him from interpleading the two claimants.

Another objection made by W. Leo Wolf is that the complainant is under a personal obligation to pay this money to him.

In this respect the case of *Atkinson v. Manks*, (1 Cowen, 691, 707, 708,) is applicable. In that case, Manks held the proceeds of goods and moneys collected for Booth, and Booth drew an order on him in favor of Atkinson, for Booth's goods or the proceeds, which Manks accepted. Booth drew another order on him in favor of Holroyd; and both Atkinson and Holroyd claimed the fund. Their respective rights depended on the source of the fund, whether it was from Booth's goods or otherwise. The chancellor and the court for the correction of errors, decided that Manks could interplead Atkinson and Holroyd, notwithstanding the acceptance of the order; and Judge Sutherland delivering the opinion of the latter court, held that the acceptance was without consideration.

In this case, when Joseph Leo Wolf's agent delivered the securities to the complainant, he directed the surplus to be paid to W. Leo Wolf, to which direction the complainant assented. Or if he expressly agreed to it, the case is no stronger.

This assent or agreement, does not interfere with his interpleading a party, who sets up a right to the surplus paramount to William Leo Wolf's. If it should turn out that Joseph was dead when his agent gave the order or direction, then his administrator would have a better right than W. Leo Wolf to the surplus. So if it appeared that prior to the direction, Joseph himself had sold the surplus to some other person. On the latter's claim to it in the one case, alleging the prior sale; or on the administrator's claim in the other, alleging his death, I think the complainant would have an undoubted right to interplead them with William Leo Wolf.

I must therefore decide that the bill is properly filed, and that the complainant is entitled to his costs out of the fund.

The defendants have stipulated that the questions between them shall be decided on the pleadings and testimony now before me, and I will proceed to that branch of the case.

The decisive point is the time of Joseph Leo Wolf's death. The precise time will never be known, till the mighty deep gives up its dead at the last great day.

For the purpose in hand, we must have recourse to the dictates of common experience, and to legal presumptions. Joseph Leo Wolf departed from this port in the steamship *President*, on the 11th day of March, 1841. Nothing has ever been heard of the vessel, or of any of her passengers or crew, from that day to the present. The usual time for steam passages across the Atlantic from New York, has been fourteen or fifteen days, and the longest passages have not exceeded twenty-three or twenty-four days. Forty days is a long passage from hence to England, in a sailing vessel of ordinary quality; and the outward trips of our packet ships are seldom beyond thirty days, and oftener under twenty-five. These are facts forming a part of the experience and common knowledge of the day, and as such are legitimate grounds for the judgment of the court.

Now, it is very true that the ill-fated *President* may have

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become disabled, and drifted about for weeks and weeks, before she was finally engulfed by the waves of the Atlantic. But what was her probable fate? A regular and tolerably fair passage, would have carried her to England before the last day of March, 1841. If she had become a wreck, and had been buffeted to and fro upon the ocean, the chances would have been greatly in favor of her being seen by some one of the many sail that are constantly passing between the United States and Europe. The fact that she had the resource of both sails and steam, thus doubling her chance of making some port in case of disaster; and the impenetrable cloud that has always hung over her end, lead the mind irresistibly to the conclusion, that she must have gone to the bottom before she had been six weeks out of New York; and the strong probability is, that she was lost within a few days after her departure.

This is a different question from the one presented, when it is to be determined whether a sufficient time has elapsed to compel payment of an insurance on a missing vessel. There all the chances in favor of safety are suffered to expire, before the final and last step is taken, by the payment of the loss. Here the fact of the death of the party is conceded, and the inquiry is, when did it happen. In the case of the insurance, after waiting for a year from the sailing of the missing ship, and then paying the loss, it is not paid on the presumption that the vessel was lost only on the day that payment was made; but on the supposition that she must have been lost within the longest customary period allowed for such vessels to reach their port of destination. It is a general rule, that if a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she foundered at sea. The underwriters are permitted to wait until intelligence of the missing vessel can no longer be reasonably expected. So the surrogate's court will delay the grant of administration upon the estate of one who sailed in such a vessel, while hope proclaims a chance of his safety. But when the expectation of tidings of ship and passenger is entirely exhausted, and the underwriter and the surrogate act upon the legal presumption of the loss of both; that presumption relates back to a time far anterior to the period when

such action takes place. It is a presumption founded upon common sense and experience, and leads to the conclusion that the loss occurred within the longest usual duration of a voyage from the port of departure, to that of the ship's destination; because a loss within that time is far more probable than that the vessel after becoming disabled, should have drifted about for any considerable period, at the mercy of the waves, without encountering some other vessel, or ultimately reaching the land.

There is no fixed rule in the common law, as to the time after which a missing vessel shall be presumed to be lost. (See Park on Ins. 86, 6th ed.) In *Houstman v. Thornton*, (Holt's N. Pr. Rep. 242,) a vessel sailed the middle of August, 1815, from Havana for a port in Holland, the ordinary duration of which voyage was about seven weeks. The vessel was not heard of after she left Havana, and eight months from the time she sailed, an action was brought against the underwriters, and was sustained by Chief Justice Gibbs.

In an early case, *Newby v. Read*, (Park on Ins. 85,) the insurance was against a loss happening before the 30th of November, 1762. The ship sailed from Newcastle for Copenhagen, which was an average voyage of ten days. She was taken by a privateer, and ransomed, and then proceeded on her voyage, but was never heard of afterwards. The report omits to state when the ship sailed from Newcastle; but the trial was in the fall of 1763, and the plaintiff recovered; so that the loss must have been presumed to have occurred before 30th November, 1762.

In *Brown v. Neilson*, (1 Caines, 525,) an insurance on the *Almira* expired on the 28th of March, 1801; the vessel sailed from Norfolk bound to New York, on the 4th of March, and she was never heard from. The usual passage between the two ports was from five to seven days, (though one instance of thirty days and another of sixty days were proved,) and vessels which sailed with the *Almira* arrived in ten to twelve days; but with a head wind, she would have taken more time than that for the voyage. It was proved that a violent storm took place the day after she sailed, and that on the 29th of March, there was a severe tempest all along the coast. The judge charged the jury that he

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thought the rule ought to be, if the vessel did not arrive within the usual limits of the voyage she was prosecuting, she ought to be presumed to be lost; and that it would not be reasonable to calculate on the utmost or greatest limit of the voyage; and he left it to the jury to say whether the *Almira* was probably lost before the expiration of the policy on the 28th of March. The jury gave a verdict against the underwriters, and the court sustained the charge and the verdict. In the case cited, the action was not brought till after March, 1802; thus affording to the underwriters, a whole year for it to become perfectly certain that a loss had been sustained.

These authorities fully confirm my conviction that the steamer *President* must be deemed to have been lost before May, 1841, and that Joseph Leo Wolf's death must have occurred before his attorney transferred this fund to his father.

The death of the constituent terminated the attorney's authority, and his transfer was nugatory. The result is, that the surplus of the securities in the complainant's hands, was assets of Joseph Leo Wolf when he died, and must be paid over to his administrator.

Under the circumstances, I will not charge W. Leo Wolf with costs. The administrator will be allowed his costs out of the fund recovered.

BREWER V. STAPLES and others.

THE purchaser of land which is conveyed to him subject to a mortgage executed by the vendor, is not entitled to the benefit of a collateral security which the vendor placed with the mortgagee subsequent to the execution of the mortgage. After such a conveyance, the land becomes the primary fund for the payment of the mortgage debt, and the personal liability of the mortgagor is the secondary fund. The mortgagor stands, in respect of the land, as a surety for the mortgage debt.

A creditor taking from his debtor in compromise and satisfaction, a conveyance of land subject to a mortgage thereon, ceases to be a creditor, and becomes a purchaser of such land; and he cannot compel the debtor to pay the mortgage.

S. having mortgaged his lands to B., subsequently transferred to B., a debt against Q. as a collateral security. Afterwards, S. being largely indebted to T., compromised the debt for less than its amount, and paid it by conveying to T. the same lands, expressly subject to the mortgage to B. *Held*, that T. had no right to require B. to collect Q's debt, and apply it to the satisfaction of the mortgage; that the land was the primary fund; and that S. could require B. to exhaust it before resorting to Q's debt, which was collateral to the mortgage.

April, 6; June 1, 1846.

THE bill was filed January 20, 1845, against William J. Staples, The Trust Fire Insurance Company, and others, to foreclose a mortgage executed by Staples to James H. Titus, on four lots of ground at Stapleton on Staten Island. The mortgage was dated September 15, 1846, was for \$1500, and was accompanied by Staples's bond of the same date and tenor. Titus assigned the bond and mortgage to the complainant, prior to April, 1840, and she claimed \$1200, of the principal to be due.

At the date of this mortgage, Staples executed a bond and mortgage to one Thurston, on five lots adjacent to the former; and Thurston assigned his bond and mortgage to Peter Embury. On the third day of April, 1840, for the further security of the debts to the complainant and Embury respectively, Staples assigned to E. Seeley, Esq. in trust for them, and as collateral to those debts, a bond and mortgage which he held, executed by one Quin. In 1841, Seeley foreclosed the Quin mortgage in chan-

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cery, and in behalf of the parties interested in it, bid off the mortgaged premises at the master's sale, for \$780. But the sale was never consummated, nor any deed given.

Staples being largely indebted to The Trust Fire Insurance Company, negotiated a settlement and compromise of the debt, offering lands in payment. Before effecting an arrangement, he proposed to add to his offer, the nine lots mortgaged to Titus and Thurston, subject to those mortgages. The compromise was finally made on that footing, and on the 29th day of May, 1843, Staples conveyed to the company, together with other lands, the nine lots before mentioned, subject to the respective mortgages thereon, viz., that to Titus on four, and the mortgage to Thurston on the remaining five; upon which the company discharged their demands against Staples. The lands conveyed by him, after deducting incumbrances, were not worth as much as his debt to the company. And at the time the testimony was taken in this suit, the deficiency exceeded the amount of Quin's mortgage.

The Trust Fire Insurance Company put in an answer to the bill, setting up most of these facts, and insisting that the complainant was bound to exhaust the security afforded to her by the Quin mortgage, before selling the four lots mortgaged by Staples to Titus. The bill was taken as confessed against all the other defendants. The cause was heard on the pleadings and proofs, as to The Trust Fire Insurance Company.

A. C. Bradley, for the complainant, made the following points.

1. The defendants, the Trust Fire Insurance Company, purchased subject to the mortgage in suit.

2. The assignment of the Quin mortgage to Mr. Seeley, was as collateral security merely.

3. The transaction, called a sale of the premises described in the Quin mortgage, even though it be not wholly void for non compliance with the statute of frauds, left the premises collateral still. It merely changed the form of the trust, without changing its nature. It was clearly no payment.

4. The purchase by the defendants, The Trust Fire Insurance Company, subject to the mortgage now in suit, was no purchase

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of the collaterals assigned by Staples as security for that mortgage. In these, the Ins. Co. acquire no interest, even as against Staples, certainly none as against the complainant. They took the land subject to the whole incumbrance of the mortgage. They can avail themselves of no defence to the mortgage, which Staples could not have interposed. And he could not insist that the transaction relative to the Quin mortgage, was any payment of the one now in suit. (*Duke of Cumberland v. Coddington*, 3 J. C. R. 229.)

5. The Trust Fire Insurance Company ask the court to make for them a new and better bargain, than they have made for themselves. Their rights are to be measured by the bargain they have made.

6. Even if the court could under any circumstances, grant the relief they ask, it cannot be done in the present state of the cause, even if in this cause at all. Their controversy is with Staples, and not with Miss Brewer.

7. The company must pay costs.

G. N. Titus, for the defendants, The Trust Fire Insurance Company.

First Point. The Trust Fire Insurance Company, are entitled in equity to have a credit allowed upon the complainant's bond and mortgage, to the amount of \$390, as of the 5th day of November, 1841, or to have the premises described in the Quin mortgage sold at the expense of the defendant Staples, or of Mr. Seeley the purchaser in 1841, and have the proceeds applied towards the payment of the bond of the complainant, and the bond of \$1500 given by said Staples to Thurston, before the land now owned by the Trust Fire Insurance Company shall be sold for the payment of the complainant's debt.

1st. Mr. Seeley is bound to complete his purchase, either on his own account, or on account of the complainant and the holder of the Thurston bond and mortgage, or on the account of the defendant Staples. The creditors of Mr. Staples had nothing to do with the secret arrangement of the parties, in relation to the bidding at the sale.

2d. The purchase of Mr. Seeley by the direction of the holders

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of the two bonds and mortgages above mentioned, was *per se* a satisfaction of those bonds to the extent of the bid. The defendants, The Trust Fire Insurance Company insist, that such credit should be allowed as against them in this suit.

Second Point. The Trust Fire Insurance Company insist that the complainant is equitably bound to resort to the Quin mortgage, and exhaust it, to obtain payment of her bond, before she shall be permitted to resort to the lands conveyed by Staples to them on account of their demand against him. Equity will compel her resort to the Quin mortgage in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties. (Story Eq. Jurisprudence, 647, 648, § 633, and cases cited in notes; *Evertson v. Booth*, 19 Johns. 486; *Hayes v. Ward*, 4 J. C. R. 123.)

Third Point. The Trust Fire Insurance Company are at all events entitled to have a decree that the complainant's interest in the Quin mortgage, together with the proceedings for the foreclosure thereof, including the decree of sale, and all the subsequent proceedings thereon, shall be assigned to them or for their benefit, or that they shall be permitted to enforce the execution of that decree, upon the payment of the complainant's bond. (*Woolcock v. Hart*, 1 Paige R. 185; *Wright v. Nutt*, 3 Bro. C. C. 270.)

Fourth Point. The complainant is not entitled to the costs of this suit against the land of these defendants. If awarded to her at all, it should be against the defendant Staples, personally.

Fifth Point. These defendants are entitled to their costs in the defence of this suit. The complainant has volunteered to prosecute this suit, at the request and for the benefit of Mr. Staples. If she is charged with costs, she will be entitled to recover them from him.

THE ASSISTANT VICE-CHANCELLOR.—The validity of the claim made by The Trust Fire Insurance Company to have the complainant give to them the benefit of the Quin mortgage, depends upon their right as between themselves and Staples, to compel the application of the Quin mortgage towards the discharge of the complainant's debt. This point necessarily arises

between the complainant and the Trust Fire Company, although in the present state of the pleadings, it cannot be decided as between the latter and Staples.

On the 29th of May, 1843, when Staples conveyed the Staten Island lots to the Trust Fire Company, he was the owner of the lots, subject to the mortgage to the complainant on which \$1200 was due, and to another mortgage executed to one Thurston for \$1500. Both of these mortgages were given in 1836, and were accompanied by the bonds of Staples.

At the same date, Staples was the owner of the Quin mortgage, or rather of the surplus therein, he having assigned it in 1840 to Mr. Seeley, as security for the payment of the two bonds to the complainant and to Thurston, and to be re-assigned to Staples on payment of those bonds.

Thus the complainant and Thurston were mortgage creditors of these lots and of Staples, and they by their trustee, Mr. Seeley, held the Quin mortgage as a security for the same debts. Staples was their primary debtor, the lots were their first security, and the Quin mortgage was their second, or collateral security.

At the same date first mentioned, Staples was the debtor of the Trust Fire Company, in a sum which he alleged he was unable to pay, and he had proposed a compromise of the debt; and after some negotiation, a compromise had been agreed upon, by the terms of which these lots were to be conveyed to the Trust Fire Company, subject to the mortgages held by the complainant and Thurston. The proposal originally made by Staples, did not include these lots, and there is no proof that the Quin mortgage was referred to, or entered into the terms of the compromise or the consideration of the parties.

The compromise was carried into full effect, and Staples complied with its stipulations. His conveyance of these lots, vested them in fee in the Trust Fire Company, and it conveys them *subject in express terms, to the two mortgages to the complainant and Thurston*. All the testimony concurs in establishing that this language of the deed was intended, and was in accordance with the agreement of the parties.

Staples did not transfer, or, so far it appears, intend to transfer,

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to the Trust Fire Company, any interest whatever in the Quin mortgage. If they have acquired any right or equity in that mortgage, it must be by operation of law.

Upon the conveyance of the lots to them, *they ceased to be creditors of Staples*. They became *purchasers* of the lots, the consideration of their purchase was a portion of the debt against Staples which they discharged, and they took the lots subject to the two mortgages held by Thurston and the complainant.

The clear effect of all this was, that the lots in question became the principal debtor to the complainant and Thurston; and as between Staples and the lots, or their new owners, The Trust Fire Company, Staples became a surety for the latter, in respect of the two mortgage debts. The Trust Fire Company did not become personally liable to pay those debts, but the lots in their hands became the primary fund for such payment, and to the extent of those lots, the company were the principal debtors upon the two mortgages, and Staples was their surety in respect of his liability on the two bonds. It is impossible to distinguish this case in principle, from *Jumel v. Jumel*, (7 Paige, 591,) and *Cox v. Wheeler*, (7 *ibid.* 248.) The same doctrine was asserted by Chancellor Kent, in *Tice v. Annin*, (2 J. C. R. 128;) and it has been enforced in many other reported cases since that time.

The authorities relied upon by the Trust Fire Company, are applicable to creditors, who having a lien upon one fund only, are entitled in equity to marshal the securities of a creditor having a prior lien upon the same fund, and having also an effective lien upon another fund or estate. And the error of the defendants has arisen from their continuing to regard Staples as their debtor, in respect of that portion of their debt which they forgave to him without any, or if any, for a nominal payment; instead of realizing that they had discharged him, and become the purchasers of his lots charged with the burthen of these mortgages.

The Trust Fire Company have no right to compel the application of the Quin mortgage to the complainant's debt. On the contrary, Staples has an equity to compel the lots to be sold for the payment of that debt, so that the Quin mortgage may be restored to him.

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I entertain no doubt whatever upon the question, and must make the usual decree for the complainant.

HAYS & ST. JOHN v. W. & J. CURRIE and N. KIMBALL.

A **BROKER** who is requested to purchase stocks, and who thereupon, to fulfil the order, procures stocks from a holder thereof, to be paid for in cash, and delivers them on the same condition to the party employing him to purchase, cannot be treated by the latter as the seller, so as to be paid by an offset of the broker's own note due to the employer.

In such case, the owner of the stocks is the seller, and the person ordering them is the purchaser. The broker has no interest in the stocks in either capacity.

On a sale of stocks for cash, and a delivery to the purchaser either conditionally that he will pay for them in a few minutes, or through a fraudulent contrivance, without actual payment; the property does not pass, and the seller may recover the stocks from the buyer, or from any person to whom he has transferred them with notice.

J., an insolvent stock broker, owed C. two notes. C. employed K. to aid in effecting payment. K. told J. he wanted J. to buy stocks for him, and next day gave J. an order to buy specific stocks, C. having meantime passed the notes to M., his servant, and procured the latter to give an order on K. for the purchase of the same stocks. J. procured the stocks from H., in order to deliver them for cash, and offered them to K., who then referred him to M. as his principal. J. refused to deliver them to M. without the cash, but was induced by K. to let M. take them on the assurance he would return with the money in a very few minutes. M. did return, and tendered J. his own notes given to C. These were refused, and the stocks demanded, but not given up. C. received the proceeds of the stocks.

Held, 1. That there was no loan or unconditional sale of the stocks by H. to J., but that H. was the seller to K. for cash, through their broker J., and the delivery without payment being fraudulently procured, the title did not pass from H.

2. If it be regarded as a sale by H. to J., the delivery to J. was conditional, and the same result ensues.

3. That H. was entitled to recover the stocks from C., or their value with interest, and the costs of the suit.

4. That K. was a proper party to the suit against C.
May 6, 7; June 30, 1846.

THE bill was filed, September 8th, 1843, by Hays & St. John,
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against W. & J. Currie who were partners in business, and N. Kimball, who was charged with conspiring with them in respect of the subject matter of the suit.

The Currie's answered jointly, and Kimball put in a separate answer. Replications were filed, and proofs were taken on both sides.

The case made by the pleadings and proofs may be thus stated. James W. Henry, a stock broker, had become indebted \$1600, on his two promissory notes to W. and J. Currie, and had no apparent means of paying them. They called in the aid of N. Kimball, in order to bring about a payment. Kimball approached Henry, to whom he was almost a stranger, with the suggestion that he was about to turn his attention to buying and selling stocks and would employ Henry as his broker, and the more effectually to gain Henry's confidence, offered to him a place for his desk in his own office. The Currie's indorsed Henry's notes without consideration, to C. McCormick a young Irishman without any means, and who was a servant in the family of J. Currie; and the next day after Kimball's interview with Henry, J. Currie brought McCormick to Kimball, and had him give Kimball an order for the purchase of \$5000, of Indiana and Illinois state stocks. Upon which Kimball gave a like order to Henry, but without disclosing to the latter that the purchase was not on his own account.

Henry purchased the state bonds in the usual mode at the public board of brokers, and called on Kimball for the money with which to pay for them and procure their delivery. Kimball declined to furnish the money without the bonds, and the sellers of the bonds were unwilling to part with them without receiving the price.

Upon this, Henry applied to the complainants as his friends, to furnish to him the state bonds so as to fill Kimball's order. He first asked them to loan him three Indiana bonds for a very few minutes, as he was to deliver them for cash. They let him take them, and he offered them to Kimball, saying if K. would take those, he would bring the other two. Kimball replied, that he wanted the whole five or none at all. Henry then returned to the complainants, and procured two Illinois bonds, and pre-

sented the whole five to Kimball, who called in McCormick and then told Henry that McCormick would take the bonds and bring him the money. Henry objected to delivering the bonds in that manner, that it was unusual, and that Kimball himself was a stranger to him. Kimball quieted him by saying the man would be gone but a very few minutes, and would soon be back with the money. Henry proposed to go with him, to which Kimball objected. Henry was thus induced to hand the bonds to Kimball, who gave them to McCormick. The latter went out, apparently to get the money, and Kimball left his office also. Henry feeling uneasy about the matter, went to the Messrs. Currie's office, where he had occasionally seen Kimball, to inquire if K. was responsible and could be trusted, and W. Currie answered him in the affirmative. He then returned to Kimball's office, and McCormick, who had also returned, offered to pay Henry for the state bonds in his two notes to the Currie's, and the balance of the price, some \$150 in cash.

Henry refused to receive them, and told Kimball, the property did not belong to him. He demanded the money or the bonds, but could procure neither; and the complainants afterwards made the same demand of the Currie's with the same result. McCormick by Currie's direction, delivered the bonds to A. S. Crosby, who paid the price for them to the Currie's through McCormick.

F. E. Mather and *S. Sherwood*, for the complainants, argued upon the following points:

I. The five bonds in question, were the bonds of the complainants, handed to Henry to be returned by him in fifteen or twenty minutes, or the cash paid for them.

II. The delivery by Henry, to Kimball, or McCormick, was upon condition of the cash being paid simultaneously therefor, and did not amount to a sale till the conditions were complied with. (*Russell v. Minor*, 22 Wend. 670; *Woodworth v. Kissam*, 15 Johns. 186; *Palmer v. Hand*, 13 Johns. 434; *Haggerty v. Palmer*, 6 John. Ch. R. 437; *Keeler v. Field*, 1 Paige, 312.)

III. The facts in the case show a gross fraud on the part of the defendants, amounting to a conspiracy to cheat and defraud

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Henry, or whosoever might trust him; by substituting the unpaid and over due notes of Henry for the bonds in question.

1. Falsely procuring McC. the wagon driver of Currie's, to pretend he was the real purchaser, when he was the mere tool of the defendants.

2. Inducing Henry to believe he was to receive the cash; instead of which it was intended to hand him his own note.

IV. The defendants ought to be decreed to return to the complainants, the three Indiana bonds and the two Illinois bonds, with damage for their detention; or to pay the value of the bonds at the time of obtaining them and interest.

G. Buckham and *E. Sandford*, for the defendants, *W. and J. Currie*, made the following points:

I. It appears by the bill of complaint that the complainants loaned the stock in question to James W. Henry, for his accommodation, to be used and employed by him in his business, upon his credit and promise to return to them the money therefor. The complainants were no parties to any contract or agreement whatever, with the defendants or either of them, and have no rights against them or either of them, either at law or in equity for any supposed wrongs or injuries upon Mr. Henry.

II. As between the complainants and Henry, the delivery of the bonds to Henry upon his own credit or responsibility was absolute, and was without fraud on the part of Henry. Henry was not acting as broker or agent of the complainants in this transaction. (*Marsh v. Wickham*, 14 Johns. 167; *Chapman v. Lathrop*, 6 Cowen, 110, and note, and cases there cited; *Conyers v. Ennis*, 2 Mason, 236; *Lupin v. Marie*, 6 Wend. 77; 15 *ibid.* 51; *Hogan v. Shorb*, 24 *ibid.* 458; *Cross v. Peters*, 1 Greenl. 376; *Warren v. Sprawle*, 2 J. J. Marsh, 528; *Satterlee v. Lynch*, 6 Hill, 228; *Cross on Lien*, 8, 38.)

III. The allegation that Henry was employed as a broker, to purchase such bonds, is denied by the answers, and the answers are not disproved. Such allegation is inconsistent with the case as stated by both parties.

IV. The allegations that Kimball stated to Henry, that he would pay in cash, the price of the bonds, is denied in the an-

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swer and is not proved. It may be conceded that it was the expectation of Henry that the cash would be paid ; but a purpose on the part of the vendee, to set off a note against the vendor, cannot be legally or properly characterised as a fraudulent transaction.

V. The allegations of combination, conspiracy, fraud and artifice, to procure by a pretended purchase, the property not of said Henry, but of some other persons, and the allegations of knowledge of the inability of the said Henry, to purchase said bonds with his own funds, and the allegations that Kimball and McCormick were informed at the time that the bonds did not belong to Henry, but had been entrusted to him by the complainants, upon any terms or conditions or in any manner, are denied by the answers and are not proved. (1 Chitt. Gen. Pr. 666.)

VI. The complainants, if they can be permitted to come into this court upon the case, and to enforce in their own names, any legal or equitable rights Mr. Henry may have against the defendants, are not entitled to the relief sought, because upon the pleadings and proofs, Mr. Henry is not entitled to any decree against the defendants or either of them.

VII. The complainants had a perfect remedy at law, and this suit is virtually an action of trover brought in this court to recover for five bonds alleged to have been converted by the defendants to their own use. No grounds are stated requiring the interposition of a court of equity, or a resort to this forum for full and perfect redress, and the bill prays judgment for damages.

VIII. The bill of complaint should be dismissed with costs.

G. Bowman, for N. Kimball. ♣

THE ASSISTANT VICE-CHANCELLOR, recapitulated the facts, and then continued: This brief statement of the transaction, is sufficient to dispose of the case. It was a contrivance to obtain this debt of Henry's, by inducing some innocent party to trust him with the possession of stocks, and then pay for them in Henry's worthless notes. Allowing that Henry had been guilty of a breach of trust towards the Currie's, as is alleged in their

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answer, their attempt to right themselves by using him to plunder others, however ingeniously devised, or satisfactory to their own consciences, was no more nor less than a fraud.

There is nothing in the argument, that there was no fraud in this instance on the part of the purchaser, inasmuch as Henry himself was the purchaser of the bonds from the complainants. In fact, Henry was neither seller nor purchaser. He was applied to as a broker, to buy the bonds, not for himself, but for Kimball. He was a mere middle man between Kimball, and such person as he should find willing to sell the bonds. He had no interest in the affair, beyond obtaining his commissions as a broker. I cannot, therefore, regard him as the purchaser from the complainants. The real buyers, through McCormick and Kimball, were the Currie's; and they attempted to procure for Henry's notes, these state bonds, which the complainants parted with for cash.

But if Henry were to be treated as a purchaser from the complainants, the defendants are in no better position. The bonds were delivered to Henry for cash only. There is no pretence that the complainants intended to credit him for the price, a single moment. The contract was therefore unexecuted until payment was made, and the complainants could reclaim their property in the hands of any one, except a *bona fide* purchaser without notice. Neither McCormick nor the Currie's were such purchasers. They did not part with any valuable consideration; and they had notice from the circumstances, as well as Henry's declaration in McCormick's presence, that Henry was not the owner of the bonds.

If Henry is to be deemed the complainant's broker for the sale of the bonds, the case is still stronger in their favor. He bargained them for cash, and he refused to deliver them save for cash. The fact that they passed into the possession of McCormick, through the trickery of Kimball, does not alter the case. Delivery usually precedes payment on cash sales, but the property does not pass until payment be made or waived. On the refusal of McCormick to pay the money, the complainants had a right to demand a return of the bonds. In most of the cases cited by the defendants, the sellers had either waived the pay-

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ment of the price by an unconditional delivery, or had affirmed the sale as an existing contract, by bringing an action upon it. The most recent of those cases, *Hogan v. Shorb*, (24 Wend. 458,) was one of the latter class. For the general principle, see *Russell v. Minor*, (22 Wend. 659;) *Acker v. Campbell*, (23 ibid. 372;) *Leven v. Smith*, (1 Denio, 571.) Also *Haggerty v. Palmer*, (6 Johns. Ch. R. 437;) and *Keeler v. Field*, (1 Paige, 312.)

The objection that there was a sufficient remedy at law, was not taken in the answer, and would now be too late, if it were valid.

The Currie's must be decreed to return the five state bonds, or in default of so doing, to pay the complainants their value on the 2d of September, 1843, with interest from that time; and they must pay the costs of the suit.

As to Kimball, he has no right to costs. He was the voluntary instrument in this fraudulent contrivance, lending himself to the Currie's for a purpose which he could not have doubted was to be accomplished by victimizing some innocent third person. He was a proper party to the suit, and may consider himself fortunate to escape being charged with the complainant's whole claim.

Decree accordingly.

Ward v. Smith.

WARD v. SMITH and others.(a)

WHERE administrators sold lands of their intestate, under an order of the surrogate, and one of them purchased the lands at the sale, and the same were conveyed to him by the administrators as such ; it was *held*, that the deed was not void, but was voidable in a court of equity, at the instance of any of the heirs of the decedent.

The purchaser under such circumstances, holds the land as a trustee for the heirs, with the right to be reimbursed for his purchase money. And purchasers under him are chargeable with notice of the trust, it being apparent upon the face of his deed.

An administrator, in 1805, became such purchaser of lands of his intestate, and they were held adversely from that time onward. W., a daughter of the intestate, was then a married woman, and so continued till 1827. In 1839, she filed a bill to set aside the sale. *Held*, that she was not barred by lapse of time.

As to other lands of the intestate claimed by the administrator, not conveyed to him by the deed under the surrogate's sale ; the heir's remedy is at law, and not in equity.

Poughkeepsie, July 27, 28 ; 1846.

THE bill in this cause was filed, in June, 1839, by Mahala Ward, against George Smith, William R. Mulford, and Nathan Barnes, and against several other parties who were heirs or descendants of Stephen Baker the elder, deceased.

It appeared by the pleadings and proofs, that the decedent died seised of a small farm and a small tract of woodland and of salt meadow, in Easthampton, in the county of Suffolk. He had thirteen children, who were either living at his death, or had died leaving issue. The complainant was one of his children, and was married at the time of his death. Her husband died in 1827. By the death of two of the intestate's heirs without issue, the number was reduced to eleven.

(a) This cause, and several of those which follow, were heard at a special term, held by the assistant vice-chancellor, for the vice-chancellor of the second circuit, at the court-house in the village of Poughkeepsie, in the county of Dutchess, on the fourth Monday of July, 1846.

The intestate's widow, and his son, Stephen Baker 2d, became his administrators. In the fall of 1804, proceedings were had before the surrogate of the county of Suffolk, for the sale of the real estate of the intestate, for the purpose of paying his debts; which resulted in an order for a sale, and a sale by the administrators, at which S. Baker 2d, became the purchaser of the farm. The same was conveyed to him in 1805, by the widow and himself as administrators, pursuant to the sale. He went into possession of the farm, and also of the other lands, and he and those deriving title under him, have had possession, claiming the same as their own, from thence to the present time.

Several years before this suit, S. Baker 2d, sold and conveyed all the premises to a purchaser, who subsequently sold them all, in different parcels, to the defendants, Smith, Mulford and Barnes; each having a portion of the farm.

The bill alleged that the surrogate's sale was set on foot, and effected by the fraud of S. Baker 2d; that there were no debts which made it necessary to sell; that the proceedings before the surrogate were wholly irregular and defective, and conferred upon him no jurisdiction; and the deed of the administrators to S. Baker 2d, was void. It prayed that the complainant might be let into possession of her share of her father's estate, and for an account of the rents and profits.

Smith, Barnes and Mulford answered, setting up among other things, that they were *bona fide* purchasers without notice; that the complainant had an ample remedy at law, and that she was barred from any relief by lapse of time. The other defendants suffered the bill to be taken as confessed.

It is deemed unnecessary to state the testimony bearing upon the alleged fraud, or the defects in the proceedings before the surrogate, as the case was disposed of on other grounds.

H. B. Duryea and *J. Greenwood*, for the complainant, made the following points:

I. The sale and conveyance to Stephen Baker, the administrator, by himself and *Mary Baker*, his mother, as administrator and administratrix, should be set aside as void, or as being in

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violation of the trust reposed in them, and against the policy of the law. (1 Ves. 9; 6 *ibid.* 625; 10 *ibid.* 246; 3 Mer. 208, and notes; 9 Paige, 240 and 649; 2 Sugd. on Vend. 129 to 137, and cases cited.)

II. No title was acquired by the said Stephen Baker, to twenty-two acres of the homestead, nor to the woodland, for they were not sold at the sale at which he purchased, and the former is not even comprised in the conveyance to him. This court having acquired jurisdiction as to the other part of the case, will exercise it also as to this, the whole premises being held under one title.

III. Benjamin Smith, the purchaser from S. Baker 2d, is chargeable with notice of the nature of the title of the said Stephen Baker, in law and fact, and neither of them could have claimed the benefit of the statute of limitations, nor could the devisees of the latter.

IV. The defendants, Mulford, Smith and Barnes, also purchased with notice.

V. The bill is not barred by the statute of limitations, even if regarded as being filed on the ground of fraud, it having been so filed within six years after discovery of the facts constituting the fraud.

VI. But the bill may be regarded as founded on a violation of a trust, and in that view is not barred by length of time. The 52d section of ch. iv. part 3, of 2 R. S. does not apply; the time mentioned in it being prospective, and not having expired before the filing of this bill. (Cooper's Pl. 146; 10 Vesey, 423; 1 Bro. Parl. Ca. 9; 2 Eden, 280; 2 Ves. Jr. 280; 4 Bro. C. C. 214; 2 Sch. & Lef. 487; 5 Madd. 54; 6 *ibid.* 153; 20 Johns. 585; 2 Sugd. on Vend. 143.)

VII. Parties claiming as *bona fide* purchasers, must aver payment and prove it. They cannot rely upon the consideration expressed in their deed. And want of notice must be averred positively. The defence fails in both of these particulars. (7 Leigh's R. 393; 10 Yerger, 335; 2 Drur. & War. 31; 8 Cowen, 361; 2 Sugd. on Vend. 125.)

VIII. The complainant is entitled to a decree to be let into possession of her share of the estate of her father, and to an account of the rents and profits, &c.

G. Miller, for the defendants, made the following points.

The bill seeks to set aside the administrator's deed, on three grounds; 1. Fraud. 2. The irregularity of the proceedings before the surrogate. 3. Informality of the deed.

I. There is a total failure of proof to sustain the allegation of fraud.

II. The bill shows that the surrogate had jurisdiction. Any irregularity in his proceedings, or error in his adjudication, must be corrected by appeal, and not by a collateral suit. (1 Kent & Radcliff's Ed. Laws of N. Y. 323, § 20; *Jackson v. Crawford*, 12 Wend. 533; *Jackson v. Robinson*, 4 *ibid.* 436; *Jackson v. Irwin*, 10 *ibid.* 441.)

III. Although the deed is informal, and may be insufficient to pass the title of the premises to Stephen Baker the second, yet it does not justify the interposition of this court to set it aside for the following reasons, viz:

1. Every defect of the deed is available at law, and does not need the aid of a court of equity. The aid of a court of equity can never be invoked against a void, defective, or informal deed. This court has no jurisdiction in such a case. (*Van Doren v. Mayor &c.* N. Y., 9 Paige, 388; *The Mayor of Brooklyn v. Messerole*, 26 Wend. 132.)

2. It satisfactorily appears in this case, that Stephen Baker 2d, paid for the property described in the deed, in good faith; he is therefore entitled to the aid of a court of equity, to establish and sustain his title to it. (*Rea v. McEachson*, 13 Wend. 465; 2 Rev. Stat. 48, §§ 61, 62, 63, 64, 65.)

3. The deed is good evidence at law and in equity of the adverse possession of the premises described in it, by Stephen Baker 2d. (*Bradstreet v. Clark*, 12 Wend. 602 and 674; *Livingston v. Peru Iron Co.*, 9 *ibid.* 511.)

4. The defendants have established in this cause an adverse possession, as against the complainant. (2 Rev. Stat. 223, § 16, 2d ed.)

IV. If the complainant has shown any title to the premises, it is as tenant in common with each of the defendants, G. Smith, Mulford and Barnes; and as such, she has a perfect remedy at

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law against each ; and she has shown no cause for joining them in one suit in equity.

THE ASSISTANT VICE-CHANCELLOR, said the inferences from the testimony, were adverse to any intentional fraud on the part of Stephen Baker 2d, but it was not necessary to dispose of the case on that ground. It was perfectly clear that he obtained the property which was conveyed to him under the surrogate's order of sale, by a breach of trust, or by taking advantage of his situation as a trustee, to make the purchase. In equity therefore, he became a trustee of the land for the heirs, with a right to have his advances refunded to him. The surrogate's orders establish the fact, that the intestate's debts were outstanding, and the sale necessary.

The trust which fastened upon the land in the hands of S. Baker 2d, continued attached to it when conveyed to the present claimants. Every person deriving title from him, is chargeable with notice of the trust, by the deed which originated his title, and which discloses on its face, that he bought at a sale made by himself and another, as administrators. The complainant is thus entitled to recover one-eleventh of the premises.

It is objected, that her remedy is barred by lapse of time, but this is not correct. When her right of action accrued, she was under the disability of coverture, which continued without interruption till 1827. At that time, there was no statutory limitation of suits against trustees. The revised statutes, in 1830, prescribed a limit of ten years. If those statutes applied to existing causes of action, (and a year since, the assistant vice-chancellor said he had held they did not,) this suit was brought within the time limited after the statutes took effect.

As to the objection, that the complainant's remedy was adequate at law, it is undoubtedly well taken as to the lands not included in the administrator's deed. There is no trust as to those, and this court has no jurisdiction. But as to the residue, there is no force in the objection. The deed was not void, nor could S. Baker 2d, have repudiated it. It was voidable, at the instance of the heirs, and the subject being one of trust, it is peculiarly the province of equity to afford the remedy.

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There must be a decree for the complainant accordingly, limited to the lands conveyed by the administrator's deed.

WHEELER v. HEERMANS and HAIGHT.

In a judgment creditor's suit, to reach things in action, on the return of an execution unsatisfied, if the judgment were recovered in the court of common pleas, the bill must allege, either that the debtor at the time the execution issued, resided in the county in which the judgment was recovered; or that the judgment had been docketed and an execution issued in some other county where the defendant was residing; or it must be shown that for some other cause, the remedy at law was exhausted by the issuing of the execution in the county where the judgment was recovered.

An allegation in such a bill, that the defendant *resides* in a place, has reference to the time of filing the bill, and not to the time of issuing execution.

It is not necessary to docket a judgment recovered in the supreme court, in order to sell lands on an execution thereon; nor a judgment in the superior court or common pleas, in order to sell on the execution lands situated in the same county. In both cases, judgments must be docketed to create a priority of lien thereby; and in the latter case, in order to affect lands in other counties.

Where the granting of costs is discretionary, the court on giving them to a party, may direct them to be set off upon a judgment held against him and another by the adverse party, although such joint judgment be not the subject of a legal set-off.

Poughkeepsie, July, 27; July 29, 1846.

THIS was a creditor's suit on a judgment recovered against both of the defendants, in the court of common pleas of the county of Dutchess, to which county an execution against their property had been issued and returned unsatisfied. The only statement in the bill relative to the residence of the defendants, was that they *reside* in the county of Dutchess. The defendants appeared separately and demurred to the bill for want of equity.

C. W. Swift, for the defendant Haight.

The bill contains no averment that the *fi. fa.* was issued to the county where the defendants resided when it was so issued; so

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that the legal remedy was not exhausted. (7 Paige, 663; 10 *ibid.* 519.) Judgments in the supreme court and common pleas, are now on the same footing, in respect of issuing executions.

J. Brush, for the defendant Heermans, urged the same grounds in support of his demurrer.

W. Wilkinson, for the complainant.

The case made by the bill, is strictly within the provisions of the revised statutes. (2 R. S. 102, § 41; 2d Ed.) The case in 10 Paige was in the supreme court, and our judgment was in the common pleas. *Leggett v. Hopkins*, (7 Paige, 149,) is decisive in our favor. Since the act of 1840, it is not necessary to issue an execution to another county, unless a transcript of the judgment was docketed there. The act did not intend to have such transcripts made, except to counties where the defendants have lands. This fact is not to be presumed, and the defendants should plead it, if they had property elsewhere.

If we are wrong, the defect is inadvertent, and we should have leave to amend without costs.

THE ASSISTANT VICE-CHANCELLOR.—The allegation in the bill that the defendants *reside* in the county of Dutchess, applies to the time of filing the bill. It is not an allegation that they resided in that county when the execution was issued.

The defendants insist, that the bill, by reason of this omission fails to show that the complainant has exhausted his remedy at law: That it is not sufficient to set forth a judgment in the Dutchess Common Pleas, and an execution to that county, unless it appears that the defendants resided in Dutchess county; or that for some reason, the issuing of an execution to the county where they did reside, would have been fruitless.

On the other hand, the complainant relies on the case of *Leggett v. Hopkins*, (7 Paige, 149,) where the chancellor decided in 1838, that on a judgment in the New York Superior Court, a creditor's bill might be filed after the return of an execution issued to the county of New York unsatisfied, without regard to the place of the debtor's residence.

The ground of that decision was, that as no execution could be issued on such a judgment to any other county, the creditor had done all he could to enforce his legal remedy.

In *Reed v. Wheaton*, (7 Paige, 663,) the chancellor held, that where the creditor's bill was founded upon a judgment in the supreme court or a decree in chancery, so that an execution on the same might issue to any county, the bill must show affirmatively, that the complainant has exhausted his remedy, by issuing an execution to the county in which the debtor resided; or it must state some good legal excuse for issuing it elsewhere, as the non-residence of the debtor, or the like. And *The Merchants and Mechanic's Bank v. Griffith*, (10 Paige, 519,) is to the same effect.

Since the act of 1840 went into operation, the plaintiff on recovering a judgment in the common pleas, may issue an execution into any county in the state, on docketing in the clerk's office of such county, a transcript of his judgment.

As a general proposition, a man's personal property is presumed to be at the place of his residence. Hence the necessity of showing in these creditor's suits, the return of an execution issued to the county where the defendant resided. The same principle which in the instance of judgments in the supreme court, or decrees in chancery, required that the execution should go to the county of the defendant's residence, is now applicable to judgments of the common pleas and superior court. There is no longer any obstacle in the way of sending executions on the latter, to any county in the state.

If the act of 1840 had simply enacted, that an execution might be issued from the court of common pleas to any county in the state, no one would have questioned the necessity of sending an execution to the county where the defendants reside, in order to exhaust the remedy at law. The provision that the judgment must be first docketed in a foreign county, before sending an execution there, imposes an additional formality, without affecting the principle involved.

I think therefore that the bill in this case does not show the complainant's remedy at law to have been exhausted, so as to entitle him to maintain his suit in this court.

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This view is sustained by the chancellor's decision in *Coe v. Whitlock*, (May 7, 1844, 4 Barbour's Decisions of Ch. 19.) He there held, in a bill founded partly upon a judgment for \$33, recovered before a justice, that it was not sufficient to set forth the return of an execution issued by the justice, which goes against personal property only. That the bill ought to state the filing of a transcript of the judgment in the county clerk's office and the issuing and return of an execution thereon against the debtor's land also.

If the justice's judgment had been less than \$25, then inasmuch as it could not be docketed against land, the authority of *Leggett v. Hopkins*, would have applied, and the justice's execution would have sufficed.

To the same effect in principle, is the chancellor's judgment in *Corey v. Cornelius*, (May 25, 1846; 6 Barbour's Decisions 22, and 4 N. Y. Legal Observer, 258.)

The docketing of a judgment in the supreme court, is not necessary except to create a priority of lien, and land may be sold on an execution out of that court, without such docketing.

So, on a judgment of the common pleas or superior court, an execution to the county in which it is recovered may be issued, and land sold upon the same without docketing the judgment. In each case the execution must of course direct the sheriff to levy on real estate.

On this point, the demurrers to the bill are well taken; but as the omission is evidently a mere slip in framing the bill, the complainant must have leave to amend on payment of costs, and without prejudice to his injunction. And the defendants costs when taxed, are to be set off against the complainant's judgment, which is admitted to be due by the demurrers. The court may direct this in its discretion, although the costs are due to the defendants severally and not jointly.

Demurrers allowed, with costs. Leave to amend the bill without prejudice to the injunction.

SARLES v. SARLES and others.

In a bill for waste, proof of a single clear instance of waste committed intentionally, is sufficient to entitle the complainant to a continuance of the injunction and to a decree for an account. The question of costs will be determined after the account is taken.

It is scarcely possible to estimate the injury which the destruction of a few valuable timber trees by a tenant for life on a farm with a scanty stock of wood and timber, may occasion to the owners of the inheritance. Hence bills to restrain waste of this character, are not to be frowned upon by the court.

A tenant for life of a farm of one hundred and sixty-five acres, is not entitled to fire-bote for the dwelling of a farmer or laborer, in addition to fire-bote for the principal dwelling house or mansion. And a custom to that effect, would be unreasonable and invalid.

In an account decreed against a tenant, for waste of timber, he may be allowed in mitigation, for fire wood and timber furnished by him for the farm, from other premises.

It is not waste for a tenant for life of a farm, to sell hay to be removed from the farm, where it is the custom of husbandry in the vicinity, to sell hay from farms for consumption by others.

The removal of coarse bog grass from a farm, which had usually been foddered on the farm, held to be waste.

So of the impoverishment of fields, by constant tillage from year to year.

The erection of a new out-house, with timber from the farm, in place of one which had become ruinous, is not waste.

In a suit for waste against a tenant for life and her under-tenant, on a decree for an account against both, the former may insert a provision that the master ascertain what portion of the sum reported against her, should be paid by the under-tenant.

Directions in a decree for an account of waste committed by a tenant for life and her under tenant, in respect of timber, dilapidations, undue tillage and withdrawing manure.

Poughkeepsie, July 30, 31 ; August 6, 1846.

THE bill was filed by Elkanah Sarles, October 10, 1845, against Keziah Sarles, her son Samuel Sarles, and against the other heirs of Samuel Sarles the elder deceased, charging upon Mrs. Sarles as tenant for life, and on Samuel as her tenant, the commission of various acts of waste on a farm of about one

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hundred and sixty five acres, situated in the county of Westchester, of which the decedent died seised and possessed.

It appeared from the pleadings and testimony, that the decedent by his last will and testament, devised to his wife Keziah S., "the use of the homestead farm," (which was the farm in question,) "to and for her use during her natural life;" and after her death, his executors were directed to sell it and to divide the proceeds, three fourths among his sons and one fourth among his daughters; the shares of such as were then dead to go to their issue, and the portions of those who should have died without issue, to go to the survivors or their heirs. The complainant and the defendant Samuel S. were sons of the testator, and there were other children living who were presumptively entitled to the proceeds of the farm under the will, and to whom the legal title in the remainder had descended.

The farm was tilled for the widow, on shares till April 1, 1840, when Samuel Sarles took possession of it under a lease from her for five years, and at the end of that term, hired it for a year. The bill alleged the commission and suffering of waste in various forms by the widow and Samuel Sarles, injuring the value of the farm to more than one thousand dollars; and it prayed for an injunction against future waste and for an account in respect of that alleged.

The answer of Keziah and Samuel Sarles, denied the alleged waste, and set forth that no timber had been cut on the farm, except such as had been necessarily used thereon, and that the fences and buildings were in a better condition than when Samuel S. took the farm in 1840.

There was a replication to the answer, and a great mass of testimony was taken on both sides. The other defendants suffered the bill to be taken as confessed.

The facts proved, so far as it is material to an understanding of the case, will be found in the opinion of the court.

M. Mitchell and *W. Silliman*, for the complainants; cited 7 Johns. 227; 26 Wend. 115; 4 Kent's Comm. 78; 6 Conn. R. 232; 3 Wend. 108; 2 Saund. 238, note 5, and 252; 1 Ves. Sen. 80; 6 Ves. 706; 11 Ves. 54; Jacob's R. 70; Jer. Eq. Jur. 366;

6 Madd. 19; 2 Bl. Comm. 282; 12 Wend. 70; 6 Jacob's Law Dict. 411, title Waste; Com. Dig., Waste, E.

J. W. Mills and *J. W. Tompkins*, for the defendants, K. and S. Sarles; cited 18 Johns. 431; and 5 Mason's R. 13.

THE ASSISTANT VICE-CHANCELLOR.—The alleged waste in this case, consists of cutting down and taking off timber and wood; the permitting the premises to go to waste and ruin for want of necessary repairs; and unhusbandlike tillage and management, by which the soil has been deprived of its proper renovation and greatly impoverished.

1. As to the timber and wood.

It will be sufficient for the purpose of the present inquiry, if the complainant have proved a single clear instance of waste on the part of the tenant for life, especially if it be shown to have been an intentional act, and not a mere accident. Such proof vindicates the filing of the bill, and entitles the complainant to a continuance of the injunction, and with the latter, to an account. The question of costs is not now to be determined, if there be a decree for an account.

Nor is it by any means just to ask the court to frown upon these cases, because of the comparative insignificance of one, or even of half a dozen, timber trees.

The temptations for a tenant for life to commit waste of timber, and to despoil the inheritance by over-cropping and neglecting needful repairs, is very great; and the difficulty of ascertaining and redressing the wrong is such, as to deter reversioners in most instances, from attempting to assert their rights. And where a farm, as in this instance, has a very scanty stock of timber and wood, it is scarcely possible to estimate the injury which the destruction of a few valuable trees may work to the owners of the inheritance, in the value of their property when exposed for sale in the market.

(See *Livingston v. Reynolds*, 26 Wend. 115; S. C. 2 Hill, 157; *Coffin v. Coffin*, Jacob's R. 70; *Onslow v. ———*, 16 Ves. 173; *Jackson v. Brownson*, 7 Johns. R. 227, 232; Eden on Inj. 114.)

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To recur to the cutting of timber on this farm by Samuel Sarles.

It appears that he built a barn on his own land, the same spring that he took possession of the farm. His carpenter, Merritt, testifies that he fell short of the requisite timber on his own land, and he took the carpenter on to the farm in question, (which I will call the homestead,) and with his aid selected and marked a few trees to be used as timber for that barn. The witness does not know that those trees were used for the purpose, but the barn was built, and there is no proof that the deficient timber was procured elsewhere than from the homestead, except one stick which came from the farm of Stephen Sarles. The defendant admitted that he had taken one timber tree for his barn from the homestead. The carpenter did not speak definitely as to the number of trees which he marked, but the presumption from his testimony is, that there were four or five. As it was in the power of the defendant to show from whence he obtained his timber, if not from the homestead, or that the trees which Merritt marked were still standing, I cannot resist the conclusion that the latter were used according to his avowed intention when they were marked.

The defendant's admission in respect of the single tree used for the barn, is coupled with a statement that he furnished to his mother on the homestead, an equivalent in fire wood, for the tree thus taken. I do not perceive that it was any the less waste, to cut the tree. It would never have been cut for his mother's fire wood; and the wood which he drew as an equivalent, would otherwise have been furnished from the wood in the swamp, which was fit for no other purpose.

It is said that the bill makes no complaint against Samuel Sarles prior to the 1st of April, 1840, and that his barn was raised the last of March in that year. But I do not understand the charge in the bill as to the wood and timber, to be restricted to the period of Samuel Sarles's occupancy of the homestead; which is undoubtedly the limit of the charge against him of bad husbandry, and of waste in omitting to repair.

The bill is therefore sustained as to the waste in cutting timber for Samuel Sarles's barn.

He sold three trees to his tenant, one of which was of some value for timber, and the others were fire wood. This was clearly an act of waste, unless excused. The defence is, first, the necessity of the case. If there were such imminent necessity, the defendant should have furnished his hired man from his own wood pile on his own farm; or instead of taking payment for the wood and pocketing it, he should have required his man to restore the same quantity to the widow, for use on the homestead. The very act of *selling it*, stamps the true character of the transaction; and it proves also that the buyer Broadhurst, had no right to fire wood as tenant.

Another excuse is, that the house occupied by Broadhurst, was on the farm before the testator's death, and was usually occupied by a tenant who labored all or most of the time on the farm, for its owner or occupant; and that the tenant for life was therefore entitled to fire-bote for this house.

I cannot assent to this proposition; and if any custom of the kind had been pretended, on this farm of one hundred and sixty-five acres, I think it would have been an unreasonable custom, and therefore invalid.

The witness Broadhurst, proves that the defendant, in 1840, drew from the homestead, four yellow oak logs. In answer to this, it is argued that he had occasion for sawed timber for plough-bote, and for repairing barn doors and gates on the homestead. The extent of reparations proved, will not account for these four logs when sawed into timber or scantling; without recurring to the white oak and other timber which is shown to have been cut there since April 1st, 1840; and the evidence is entirely wanting, as to the necessary extent of plough-bote. The yellow oak logs are not excused or justified.

Besides these instances, the testimony of Mr. Sands furnishes strong ground for believing that more extensive destruction of timber has occurred; and the evidence is at least doubtful, whether Samuel Sarles did not carry off a considerable quantity of fire-wood from the swamp, for consumption on his own land. I do not analyse the testimony on these particulars, because enough of waste has been already ascertained to require me to

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direct an account, and they can be investigated before the master, with the aid of further testimony.

In taking the account, the defendant may be allowed in mitigation, for the value of all fire-wood and timber furnished for the use of the homestead, from his own farm.

2. Samuel Sarles is charged by the bill with having occupied the homestead in an unhusbandlike manner, and permitted the fences, barns, and other erections on the premises, to go greatly out of repair; to the injury of the fee.

I do not think this charge is satisfactorily established against Samuel Sarles, during the time of his occupancy, except as to the tillage of one field, hereafter mentioned.

3. It is also alleged against Samuel Sarles, that instead of feeding on the homestead, the hay, straw, and like produce, raised thereon, as good husbandry required; he has conveyed the same off of the premises, and sold it, or used it on his own farm. Also, that he has conveyed manure off of the homestead, in like manner. That he has omitted to seed down the fields with grass and clover seeds, and has wasted and mismanaged the same in his tillage.

As to these allegations, there is no proof of any misapplication of the manure. As to the hay and straw, the testimony shows the sale of small quantities of hay every year, which was removed from the homestead; and that some hay and straw have been conveyed to the defendant's farm, and there foddered out. Also, that every year, he has cut and conveyed on to his own land, several loads of bog grass, which were of some trifling value. On the other hand, the defendant has brought considerable hay, and some straw, from his own land, and fed it out on the homestead, and has manured it yearly with plaster. It is shown to be the custom of most of the farmers in the vicinity, to sell some hay for consumption by others, off from their farms. (See *Eden*, 142; *Onslow v. —*, 16 Ves. 70.)

My conclusion is, that there is not enough proved against Samuel Sarles, to authorize a decree against him in respect of the hay and meadow grass. His most unjustifiable act, in my view, was the annual removal of the bog grass. For this, so far as it was an injury to the freehold, he is liable to account.

So in respect of the over-tillage and bad management of the land. With the exception of the field back of the barn, mentioned by Abraham Sherwood, Jr., on which there was rye harvested in 1845, I do not think the testimony clear to establish the alleged bad husbandry, during the occupancy of Samuel Sarles. The injury to the fee, growing out of that field, is waste, which will properly be included in the account to be taken.

4. It remains to examine the case made against the tenant for life, herself. The bill alleges, that she not only has permitted Samuel's acts of waste, but she has knowingly permitted the premises to go to waste and ruin, for want of necessary repairs.

The latter charge embraces the whole time of the widow's tenancy, and I think the proof makes out sufficiently, that there has been waste in the buildings, fences, and other erections, within that period. The new smoke-house, which was put on shortly before this suit, in the place of one which had become ruinous, was not waste in my opinion, even if constructed with materials obtained from the homestead.

There must be an account against the widow under this charge, and the master, after ascertaining what sum is requisite to put the buildings, fences, &c., in as good repair as they were when the testator died, (making a proper allowance for the natural wear of the buildings,) must also report what portion of that sum, if not the whole, ought to be paid by the tenant for life, to make such reparations.

If the widow request it, the master may also ascertain what portion of the latter amount, if any, ought to be made up to her by Samuel Sarles, in respect of his occupancy of the premises.

The decree against Samuel Sarles will be for an account of the waste committed by him, in respect of the trees, timber, and firewood of the homestead, and of the injury to the same by his unhusbandlike management and undue tillage of the field back of the barn, and of the injury which has arisen by reason of his withdrawing the bog hay from the premises.

There must also be a perpetual injunction against waste, as to Keziah and Samuel Sarles. (See 26 Wend. 123; *Poyas v. Smith*, 2 Dessauss. 65; and *Eden*, 146, 151, 152; as to the decree.)

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All further questions and directions, will be reserved until the coming in of the master's report.

J. W. RICHTER v. E. STALL and wife.

WHERE a debtor, owing a mortgage debt payable in small annual instalments at a future period, on the application of his creditor, advanced to the latter fourteen hundred dollars, on an agreement that he would apply and indorse two thousand one hundred dollars as a payment on the mortgage, and the creditor receipted that sum as such payment:

Held, 1. That there was no loan nor any forbearance, directly or indirectly, by the debtor to the creditor, and that the agreement was not usurious.

2. That the agreement was supported by a valid and sufficient consideration, and was not unconscionable.

Where about two-thirds of the sum secured by a mortgage, was paid at a time when a small amount was due for interest, and when no part of the principal, (which was payable in ten annual instalments,) was actually due; and there was no direction given by the debtor, nor any actual application of the payment made by the creditor; it was *held*, that the law must make the application, and that after discharging the interest due, the balance must be applied rateably, to the exoneration of all and each of the instalments of principal secured by the mortgage.

Costs to neither party, where both have claimed too much.

Poughkeepsie, July 27; August 6, 1846.

ON the first day of May, 1842, the defendants, E. Stall and wife, executed to Walter Richter a mortgage on a farm of 195 acres, in the town of Clay in the county of Onondaga, to secure the sum of \$3081, according to E. Stall's bond of the same date, the condition of which provided that the interest should be paid annually for two years from that date, and thereafter the principal was to be paid in instalments of \$300 each, with interest to be paid annually on all sums unpaid.

The mortgage was given for a part of the purchase money of the farm which Walter Richter sold to the defendant E. Stall, and Richter conveyed the same to E. Stall, by a full covenant deed, including covenants against incumbrances.

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At the time Walter Righter gave the deed, and received the bond and mortgage, there was a prior mortgage on a portion of the farm, executed by one Pettit to one Empie, which W. Righter was bound to discharge. This mortgage bore date November 22d, 1836, and fourteen hundred dollars remained unpaid upon it on the 17th of April, 1843, of which a considerable sum was in arrear. The holder of the mortgage at that time was about instituting proceedings for its collection, and the bond accompanying it had been sued. W. Righter applied to E. Stall to anticipate the time of payment of his bond and mortgage, so as to enable Righter to pay the Pettit mortgage. An agreement was thereupon made between them, by which Stall was to advance and pay the \$1400, in discharge of the Pettit mortgage, and W. Righter was to indorse \$2100 upon Stall's bond and mortgage, as a payment thereon. At the time of making this arrangement, which was on the 17th day of April, 1843, Stall signed an agreement by which he was to pay the Pettit mortgage, and to indemnify W. Righter against the same; and Righter signed two receipts, one for \$1400, and the other for \$700, each stating that the respective amounts were to apply on Stall's bond and mortgage, and to be indorsed thereon as of that date. Stall paid the Pettit mortgage, on the 6th day of May, 1843, pursuant to his agreement. The interest for one year on his own bond and mortgage, fell due on the first day of May, 1843, but there was no principal payable till two years from that time.

On the 23d day of May, 1843, Walter Righter assigned Stall's bond and mortgage to the complainant, John W. Righter; who in July, 1845, filed the bill in this cause to foreclose the mortgage. He claimed that only \$1400 had been paid on the bond and mortgage, and that he was entitled to recover the instalment of principal due May 1st, 1845, and the annual interest for two years preceding, on the sum unpaid.

Stall and wife answered the bill, insisting that the whole \$2100 was a payment, and that there was no principal whatever due to the complainant. The cause was brought to a hearing on the pleadings and proofs.

W. Eno, for the complainant.

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P. Outwater, Jr., for the defendants.

THE ASSISTANT VICE-CHANCELLOR.—At first blush the defendant's claim for the seven hundred dollars, appears to be unconscionable if not usurious; but I am convinced, on reflection, that the claim must be allowed.

1. As to the alleged usury. In order to constitute usury, there must be either directly or indirectly, a loan or forbearance of money, or some other thing. (Blydenburgh on Usury, 84 to 86, and the cases there cited.) Here there was no forbearance, because Righter was the creditor; and there was no loan, because first, the money received by Righter, was a payment made and applied upon a security which he held against Stall; and second, it was never to be repaid by Righter to Stall. So far from its being a loan by Stall to Righter, it was a payment which actually extinguished so much of a debt which Stall owed to Righter, payable at a future day.

If Righter had sold this bond and mortgage, to the witness, Mr. Soule, for instance, at a discount of \$700, receiving from Mr. Soule \$1400, in cash, and his notes on time for the balance; no one at this day, would question the legality of the transaction.

If Righter had been in the same urgent need of \$2500, in May, 1843, and had agreed with Stall, that he would receive that sum in full of the mortgage, and Stall had paid it to Righter, and obtained his discharge of the mortgage; I do not think any effort would have been made to set aside the discharge, and re-instate the mortgage for the sum deducted.

This transaction does not differ in principle, from those which I have supposed.

2. The complainant claims that there is no good or sufficient consideration for the agreement to indorse \$700, on the bond and mortgage, and that it was unconscionable.

On this point, I think the consideration was undoubtedly valid, and sufficient to support the agreement.

By the terms of the bond and mortgage, no principal fell due till two years from the time when the \$1400, was paid, and it then was to become due in annual instalments of \$300, each,

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and when the agreement was made, there was no interest yet due. There was about \$200, of interest falling due on the 1st of May, 1843, and the residue of the \$1400, was therefore to be purely an advance of principal. The payment of \$1200, at that time, which could not be exacted except in equal amounts, two, three, four and five years thereafter; was in contemplation of law a benefit to the creditor, and the raising and paying it, an injury to the debtor, which formed a valuable consideration.

It appears that Righter was then liable to be prosecuted in respect of the Pettit mortgage, for \$1400, and a suit had been commenced against Pettit, for the debt which Righter was bound to pay.

He thought it was better for him to obtain the \$1400, by discounting \$700, on a security due to himself, but payable at a distant period, than to raise it by selling other property at a sacrifice, or by making a loan. It is impossible for the court to say that he was not correct in his judgment of the matter, or to weigh the extent of its benefit to him, or its injury and inconveniences to Stall. The parties themselves settled the question by the agreement made at the time, for the allowance of the sum of \$700.

This court has no more right to disturb or remodel their contract, than it would have had, if in order to raise the same \$1400, Righter had sold Stall for cash, a farm worth \$2400, on a sale upon a long credit, and for which he had been offered that price.

I entertain no doubt but that the whole \$2100, is to be allowed as a payment on the bond and mortgage: on the 6th day of May, 1843.

The question as to its application remains to be adjusted.

As to this, the year's interest then accrued on Stall's mortgage, with five days interest on the \$2100, must first be discharged, and the residue must go in discharge of the principal of the bond and mortgage. On the balance of principal, the complainant is of course entitled to the annual interest from May 1, 1843.

Then as to the principal discharged, shall it go in exoneration of the earlier or the later payments of principal, as secured to be paid by the bond and mortgage?

The parties did not stipulate on this point, the defendant gave

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no direction about it, nor did the mortgagee make any specific application at the time.

The court must therefore apply it as justice to the interest of both parties requires.

I think the sum of \$1882 29, paid towards principal, must be applied rateably to the exoneration of all and each of the instalments of principal which were provided for in the bond and mortgage. This may be readily done by computation. When this bill was filed, one of the reduced instalments of principal was in arrear, and two year's interest on the whole unpaid principal, viz. \$1198 71. Another instalment of principal fell due on the 1st of May last.

In regard to costs, both parties are in the wrong in this litigation. The complainant claimed too much, while the defendants denied that any thing was in arrear. In order to do as exact justice as possible, I will give to neither party costs against the other to this time. The decree will settle the precise amount due, and in arrear, and the sums payable in future. If the defendant omit to pay the sum in arrear, with interest, within thirty days after the service of a copy of the decree on his solicitor, the decree will direct a sale by a master of so much of the mortgaged premises as will pay the sum in arrear, with interest and the complainant's costs subsequent to its entry. It will also provide for an application by petition by the complainant, for an order to sell, whenever future payments become due and remain in arrear.(a)

(a) The following statement made in conformity to the opinion, illustrates the principle adopted in the application of the payment.

1842, May 1, Bond and mortgage,	\$3081
1843, May 1, Interest 1 year,	215 67
" 6, " on the 2100, from May 1, till paid, 5 days,	2 04
		<hr/>
		3298 71
" 6, Sum paid, per agreement,	2100
		<hr/>
Balance of principal, May 1, 1843,	\$1198 71
		<hr/>

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Balance of principal, May 1, 1843,	1198 71
Last payment was to be,	81
Then	
As 3081 : 81 :: 1198 71 ;	
Gives as the last payment rateably, on a principal of	
1198 71, the sum of 31 12.	
Whole principal,	1198 71
Last payment,	31 12 (say 31 11)
Leaves the 10 instalments,	1167 60
and each of the ten is	116 76
Then for the amount in arrear,	
1846, May 1, Interest 3 years on 1198 71,	251 73
Instalments due May 1, 1845, and 1846,	
two of 116 76, each,	233 52
	485 25
Add interest on the 233 52, till date of decree,	
Total in arrear,	

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WHERE parties contract for the sale of land, for a gross sum or price, under a mutual mistake as to the quantity contained in the parcel sold, believing it to contain about a fourth more than its actual contents, and the vendee has taken possession, made valuable permanent improvements, and paid nearly all the price; equity will compel the vendor to convey the land actually owned by him, with a rateable deduction from the price for the deficiency.

D. sold to G. by an executory contract, two lots of wild land, which by the survey and location thereof made for D. and others, contained $187\frac{1}{2}$ acres; the one intending to sell, and the other believing that he was buying, the lots as thus surveyed. It turned out, that in making such survey and location, the surveyor had extended and marked his line beyond the true boundary of the tract he was laying out, and had thereby included $43\frac{1}{2}$ acres in D.'s two lots, to which he never had any right or claim.—*Held*, that this was a case of mutual mistake. That the deficiency was not in the subject matter of the contract, for that was the two lots as marked and surveyed for D.; but that the difficulty was in giving title to that subject matter.

Where commissioners appointed by a statute to survey and divide a tract of land, run out and marked the boundary of one of the divisions on the land itself, at a distance of ten chains from the place where they laid it down and described it as being situated on their map and field notes; the division is limited to the line actually marked by the commissioners, and cannot be extended to the line intended as shown by the map.

Equity will not compel a purchaser to take land which is involved in a doubtful and disputed question of boundary.

The vendee who has assigned his contract, is a proper party in a suit by his assignee against the vendor, for a specific performance; but if he be omitted, and no objection be raised till the hearing, the court will direct a decree, on his executing and filing an assent and agreement in proper form, to be bound by the decree.

Poughkeepsie, July 31, August 1; August 17, 1846.

THIS was a bill for specific performance, filed October 17th, 1845, by Francis C. Voorhees and his partners, against Nicholas De Myer. The bill stated that in May, 1817, De Myer claiming to be the owner in fee of $187\frac{1}{2}$ acres of land in the town of Lexington, in the county of Greene, in the Hardenburgh Patent, agreed to sell the same to William Griffin, for four dollars per

acre. That thereupon a contract in writing, was executed between them in the words following :

“Nicholas De Myer of Kingston, agrees to sell and convey to William Griffin of the town of Middletown, Delaware county; lot number nine and eleven, in number twenty, in great lot number thirty-four, one hundred eighty-seven acres and one-half, for seven hundred and fifty dollars, to be paid in five years from this date, in equal annual payments, together with the interest of the whole on each payment until paid. The deed to be delivered on payment of one-half of the purchase money, and satisfactory security given for the remainder. And for the true performance of this agreement, the parties bind themselves in the penalty sum of one thousand dollars, as witness our hands this 30th day of May, 1817.

Witness present,
Arrietta Kiersted.

NICHAS. DE MYER,
WILLIAM GRIFFIN.”

That there was a misdescription of the premises in the contract, in this, that the lots intended to be sold are lots number nine and eleven, in Division number thirty-four in Great Lot No. 20, in the Hardenburgh Patent. That at the time of the contract, the lands were wild, uncultivated, and covered with woods.

That Griffin entered upon a part of the lots, supposing there was one hundred and eighty-seven and one-half acres in both, (De Myer at the sale having shown him a map and survey of lots 9 and 11, exhibiting that quantity,) soon after he bought them, cleared up large portions of them, and erected a dwelling house, barn, stable, fences, and other valuable improvements thereon, and remained in possession of such part, and claiming all to which De Myer had title, to the present time, and made payments to him almost every year, towards the purchase money, until 1845, having paid in all, over \$1550 to De Myer.

That about the time Griffin entered, one Garrison took possession of forty-three and one-half acres, parcel of the one hundred and eighty-seven and one-half acres, as located on De Myer's map and survey of lots 9 and 11, and Garrison and those under him, have ever since been in possession of the forty-three

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and one-half acres, claiming the same under a title adverse to that of De Myer.

That on learning of this claim, and that De Myer had no title to the forty-three and one-half acres so sold to him as a part of lot 11, Griffin apprised De Myer of the possession and claim of Garrison, but the former never took any measures to assert or maintain his title thereto. Griffin never took or had possession of the forty-three and one half acres, and De Myer never had any title to or interest in it, or any authority to sell the same.

That about twenty years ago, a controversy having arisen between some of the proprietors of the subdivisions of Great Lot No. 20, as to the true boundary lines of the Divisions, (one of which was No. 34,) many of the proprietors of No. 34, having the same title and from the same source as De Myer, after investigating the matter, relinquished all claim to go beyond a certain commissioner's line run before 1800, and which line cuts off from the lots 9 and 11, as sold by De Myer, the same forty-three and one-half acres held by Garrison.

The bill then sets forth, that in April, 1845, the complainants recovered a judgment in the supreme court against Griffin, on which they had an execution issued and returned unsatisfied, and being about to file a creditor's bill, Griffin executed to them an assignment of his contract with De Myer.

Previous to this, with a view of securing them, Griffin had applied to De Myer for a deed of the premises sold to him, who refused to give it unless Griffin would pay the whole purchase money expressed in the contract, and on receiving the deed, would release the forty-three and one-half acres.

The complainants notified De Myer of the assignment to them, and renewed the application for a conveyance, with the same result.

The bill prayed for a specific performance, and for an abatement of the price *pro rata*, if De Myer should be unable to give to the complainants a good title to the forty-three and one-half acres.

The answer of De Myer, stated that at the time of the sale, he and his wife claimed to be seised in fee of lots 9 and 11, in right of his wife. That the price for which he sold the lots, was

the gross sum of \$750, without reference to the precise number of acres, and that he did not sell them by the acre. That he did not produce to Griffin at the sale, or at any time, a map or survey of the lots. That he then supposed and still believes the lots contained one hundred and eighty-seven and one-half acres; and Griffin entered on all of the land he chose, and might have entered and possessed the whole one hundred and eighty-seven and one-half acres. That Griffin was bound to take and maintain possession of the whole; that he did not inform the defendant of Garrison's claim or possession within twenty years of the time he alleges such possession was taken; and if by Griffin's omission to take possession of the whole premises, any part of them is now held adversely or by a title growing out of Garrison's claim, Griffin and his assignees must be the sufferers, and not the defendant. And the defendant denied that any adverse possession under claim of title had ever been taken or maintained of the forty-three and one-half acres. The defendant was ignorant of the alleged investigation of proprietors under the same source of title, as to the boundary lines of the Division No. 34 of Great Lot No. 20, and he never acquiesced in their conclusion. When the applications were made for a conveyance, the defendant was ready and offered to convey, on receiving the balance of the purchase money due on the contract, but would not by his deed, warrant that lots 9 and 11 contained one hundred and eighty-seven and one half acres, or convey them by a special description which would include the lands possessed and claimed by or under Garrison.

That he has not done or suffered any act by which the title of himself and his wife to the whole of the one hundred and eighty-seven and one half acres, has been impaired or affected; and they have a good title to the whole.

In other respects the answer admitted the statements of the bill, except as to the judgment and proceedings thereon, which were regularly proved.

Issue being joined on the answer, both parties took testimony. The evidence is in part, to be found in the opinion of the court.

The defendants read in evidence an act of the legislature,
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passed March 29, 1790, appointing Christopher Tappen and James Cockburn, commissioners for making a survey and running the lines of various tracts of the Hardenburgh Patent; and amongst other duties, they were to survey and divide Great Lot No. 20, and three other lots, according to a division thereof made by Ebenezer Wooster in 1749, and they were to mark on their map, the names of each heir of the then former owner, for whom Wooster had marked the same.

These commissioners on the 8th of March, 1791, filed in the clerk's office of the county of Ulster, a map of the lands surveyed and divided by them pursuant to the statute appointing them, and their minutes containing the field notes and descriptions of the lots and subdivisions. By this map and description, division number 34 in Great Lot 20, is laid out as being 72 chains and 47 links wide at the east end, and 72 chains 44 links wide at its west end; and division No. 35 lying next north of No. 34, is laid out as being 72 chains and 46 links wide at its east end and 72 chains and 44 links wide at its west end; and several divisions of the same Great Lot correspond in width with these; all being 280 chains in length from east to west.

JAMES COCKBURN, a witness for the defendant, who was seventy-one years of age, a nephew of the commissioner named in the act of 1790, and a brother of the defendant's wife, and who formerly was the owner of lands under the same title in division No. 34; testified that in 1811 or 1812, he subdivided division lot No. 34 into sixteen lots, and laid out the lots in question, No. 9, containing forty-five and one fourth acres, and No. 11, containing one hundred and forty-two and one fourth acres, the latter lying north of No. 9, and bounding on division 35. These small lots fell to Mrs. De Myer. He run the outer boundaries of division, No. 34, according to the map and description filed by the commissioners. He found the southwest corner, and starting from there found the southeast corner at the proper place then run the east line, and found no corner, but taking the commissioners distance, he then run the north line the required length, and found a corner within about two and a half chains of where he came out on the west line. He found that two lines had been run and marked for the north line of No. 34, one was about 62

chains from the south line, the other was 75 chains from that line. In subdividing it, he took neither, but run a line at the distance of 72 chains 47 links as called for by the commissioners map. The owners and settlers on division No. 35, pretend that their lands run in upon No. 34, some ten or twelve chains, and there is a gore thus made which has sometimes been in dispute. The disputes arose after the witness run and marked his line, and before 1820.

The complainants proved that Griffin had cleared a hundred acres of the land bought of De Myer, fifteen years ago or more. A surveyor proved that lot 11 contained 100 acres to the line of the gore; and its lines, extended across the gore to the line of division No. 34, as run by Mr. Cockburn in 1812, would include thirty-nine and 68-100ths acres in addition. The possession of this last parcel by persons claiming it, as stated in the bill, was proved, and that it was cleared at or before the time Griffin bought. Several witnesses who had resided near the premises or known them from twenty-five to forty years, testified to the existence of the marked line of trees which Mr. Cockburn found at the south side of the gore, and that it was regarded by the old settlers as the division line between the large divisions 34 and 35. The marks on the trees were described as appearing in 1820, to have been made several years, and the bark had partly grown over them. At some time between 1816 and 1820, two surveyors named Tappen, run the south line of the gore, as being the line between divisions 34 and 35, and marked the trees on that line. The line of marked trees found there by Mr. Cockburn, extended the whole length of the division or lot No. 34.

J. O. Linderman, for the complainants.

M. Schoonmaker, and *J. Van Buren*, for the defendant.

THE ASSISTANT VICE-CHANCELLOR.—The objection that William Griffin ought to have been a party to the suit, was made for the first time at the hearing. It therefore came too late, if a perfect decree can be made between the present parties; and if

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Griffin be an indispensable party to a decree between them, the court will direct the cause to stand over so that he may be made a defendant. It is clear that he may be a party with propriety, and if the complainants prove to be entitled to relief, the decree may provide for bringing Griffin into the suit.

On the merits of the case, it seems to me to be an important question whether the subdivision 11 in lot 34, did or did not include the gore, as it is called, lying northerly of Griffin's possession. The north line of the subdivision is the north line of lot 34, and cannot extend beyond the latter. Where then was the north line of lot 34?

As I understand the private act of 1790, under which Great Lot No. 20 was run out and subdivided, it was the duty of the commissioners to mark the division lines. If so, and they performed that duty, there must have been a line designated and marked through the forest in 1790 or soon after, as and for the north line of this subdivision 34.

When Mr. Cockburn, the witness, proceeded in 1811 or 1812, to subdivide lot 34 into smaller lots, he found two lines marked on its north side, neither of which corresponded with the required distance from the south line as laid down in the commissioners survey and map. The most southerly of the two lines found by Cockburn, is the south line of the gore, and corresponds with the north line of Griffin's possession. But this falls ten chains short of the distance on the commissioner's map. The other marked line was two and a half chains beyond that distance. He found no line at the proper distance, nor any marked corner at the northeast corner; but at the northwest corner, at a point one or two chains from where he came out in running the north line at the proper distance, he found the corner as marked by the commissioners.

It does not appear that this corner corresponded with the northerly marked line, and it could not have corresponded with the other. The southerly line which Mr. Cockburn found, must have been there before the Tappen's run their line as mentioned by the witness Van Valkenburgh; for that was about the time Griffin entered into possession. The Tappen's must therefore

have run upon the line which Cockburn saw in 1811 or 1812, and marked more trees to designate it.

Now Mr. Cockburn, as a surveyor, residing in that region of country, must have known at that time, whether the southerly line which he found was an old line or not ; whether it had been marked twenty years, or only two or three years before. And his silence as to the character of both lines in this respect, is singular. Again, he was a party interested in maintaining the line as far north as possible, yet he did not adopt the northerly line which he found marked ; and this shows clearly that he did not in 1811, deem that to have been the line marked by the commissioners.

Garrison took possession of the gore from Brooks in 1820, and he testifies that there was then a line of marked trees on the south line of the gore, which had apparently been made some years before, and the bark of the trees had partly grown over the marks on them. This, from the description of the witness, must have been the same marked line that Cockburn saw eight or nine years before ; and the growth of the bark over the marks, much strengthens the presumption that it was the line originally run by the commissioners.

It certainly makes it so very doubtful whether lot 34 as laid out, ever actually included the gore, that this court will not compel a purchaser to take the title to it from one whose claim is limited to the north boundary of that lot.

The line marked by the commissioners, must of course control the extent of the lot, and it cannot be carried beyond that line by the courses and distances contained on their map. (*Van Wyck v. Johnson*, 18 Wend. 157.)

It is possible that some light might be thrown upon the point, by extending a survey across subdivision 35. Still, if the north line of 35 shall be found to correspond with that laid down by the commissioners on their map, and by some error of theirs, such as counting 72 chains when they had run only 62, they marked and established by monuments, the north line of subdivision 34 ten chains south of where it should have been ; there is no remedy for it, and number 34 must continue to be 62 chains wide, while 35 will retain its enhanced width of 82 chains.

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The locality of this line was distinctly in issue, and I must presume that the parties exhausted their testimony in regard to it. If any witness could have aided the defendants, it was Mr. Cockburn, whose testimony I have already examined. I feel impelled, therefore, to decide upon the locality, as between these parties, and my opinion is clear, that the south line of the gore was the original north line of lot number 34 as actually marked and designated by the commissioners. The lot 11, as owned by the defendant and his wife, is necessarily bounded upon this line, and the defendant is not able to give to the complainants a title to the gore in question.

This being the result, it is next contended on the part of the defendant, that the contract was for the sale of lot 11, whatever its contents might be, and that the expression, "one hundred and eighty-seven and one-half acres," was mere description. In considering this point, it must be observed that this is an executory contract between the parties.

The bill charges, that previous to the bargain, the defendant exhibited to Griffin a map showing the lots 9 and 11, and that as they were there laid down, they contained one hundred and eighty-seven and one-half acres. This is denied by the answer, and it is not proved. But what are we to infer from the contract itself, with the surveys and descriptions? The defendant contracted to sell to Griffin, "lot number nine and eleven in No. 20, in great lot No. 34, one hundred eighty-seven acres and one-half, for seven hundred and fifty dollars." This is a contract for the two lots, for a gross sum, or *per aversionem*, as it is in the civil law; but what was the intention of the parties? Was there a mutual mistake, or was there a misrepresentation? Of the latter I find no proof. But I think there is sufficient evidence of a mistake.

If Griffin, after ascertaining the defendant's terms, had gone to examine the land, he would have found lots 9 and 11, as laid out by Cockburn in 1811 or 1812, containing one hundred and eighty-seven and one-half acres. He would not have been led to examine the lines of lot 34, for the description which he had received designated lots 9 and 11 as subdivisions of lot 20, instead of 34. Now I am to presume that Griffin either did exam-

ine before contracting, or satisfied himself from the statements of others, who as he supposed had examined, or otherwise knew the two lots.

So the defendant undoubtedly supposed these two lots run across what is called the gore, and embraced the one hundred and eighty-seven and one-half acres. If he had ever visited them, he would have found them so marked on the ground. If he took his information from Cockburn's subdivision of lot 34, he found the two lots laid out by metes sufficient to contain one hundred and eighty-seven and one-half acres. His whole idea of the lots, and his information concerning them, necessarily rested on Cockburn's survey, because the lots originated in his survey and subdivision. That he understood and believed the two lots to contain the full quantity, is further proved by his subsequent assertion, from time to time, that lot 11 extended across the gore.

The case then, upon the contract itself and the several surveys, is this. The defendant and Griffin, dealing in respect of lot 11, proceeded upon Cockburn's survey and location of the lot, by which it contained one hundred and forty-two and one-fourth acres. The one intended to sell the lot as laid out and marked by Cockburn, and the other supposed that he was buying the lot so marked; which truly contained the quantity of one hundred and forty-two and one-fourth acres. On completing the contract, it turns out that Cockburn in running this lot 11, extended it so much farther north than he should have done, as to include forty-three and one-half acres on the lot 35, and the defendant never had any right or claim to those forty-three and one-half acres.

This is a plain instance of mutual mistake. The lot 11 for which Griffin contracted, was the one laid out by Cockburn: The lot 11, which the defendant is able to convey, is the same lot as Cockburn should have laid it out, bounded on the north by the lot 35. The deficiency is not in the subject matter as described in the contract, for Cockburn's lot 11 as he marked it, holds good as to quantity. The difficulty is in giving title to that subject matter.

This frees the case from the bearing of the authorities cited

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by the defendant, to show that where a definite lot is conveyed stating the number of acres, the latter is merely descriptive, and the boundaries of the former must govern, whether they contain a greater or a less quantity of land.

The complainants, as assignees of the contract, are entitled to a decree for its performance, so far as the defendant can make a title. And for the forty-three and one-half acres, to which he cannot convey a good title, there must be a rateable deduction from the price. This deduction should be made at the outset, and interest computed upon the balance, and the payments applied accordingly.

To obviate the delay of making Griffin a party, the complainants may file his assent under seal, duly acknowledged, to be bound by the decree. This consent should be recited in the decree and enrolled with it.

The decree may also declare that the title of the defendant and his wife to the land in the gore, is not to be affected by it, for any purpose other than the performance of this agreement. If the parties can agree upon the computation, a reference will be unnecessary.

As to the costs, there has been a mistake common to all the parties, and neither of them appears to have arrived at a correct view of the facts till since the litigation commenced. I think it is just to give no costs to either against the other, up to the entry of the decree.

If Griffin declines to execute the consent, the complainants may make him a party by a supplemental bill.(a)

(a) This decree was affirmed on appeal, by the Supreme Court in Equity, January, 1848.

THOMPSON and others v. THE NEW YORK AND HARLEM RAIL
ROAD COMPANY and others.

THE legislature in 1790, authorized M. to erect a toll bridge across a navigable river or arm of the sea, where the tide flowed, and to maintain the same for sixty years; and the act provided that it should not be lawful for any person or persons to erect or maintain a bridge or ferry, between the two places which were to be connected by M.'s bridge. The toll bridge was built accordingly. In 1832, the legislature authorized the construction of a railway across the same river, between two distant places, which would necessarily cross the river at or near such bridge, and which was constructed and was carried across the river by a bridge, one-fourth of a mile distant from the former; and in its operation the railroad diminished by one-third, the accustomed receipts of the toll bridge;

Held, 1. That the act conferring the franchise on M., was not a covenant or grant that no similar franchise should be conferred on others; and did not restrict the authority of a future legislature, to establish a toll bridge or ferry at the same place.

2. That the grant to the rail road company did not impair the obligation of any contract with M., within the meaning of the prohibition in the constitution of the United States.

3. That the franchise granted to the rail road company, was not the same as that conferred on M., nor so similar as to be deemed an interference with the latter, in the sense in which a new bridge or ferry interferes with one previously established at the same point.

4. That if it were a direct interference, the rail road company were authorized to erect and maintain a bridge for the use of their railway, adjacent to M.'s bridge, and the act granting them the power was valid.

It is the province and the right of the legislature, in the exercise of its sovereign duty to provide ways for the use of the people, to authorize the construction and use of newly invented or improved modes of conveying passengers and freight; although the necessary consequence may be, that profitable modes of conveyance in actual use, will thereby be superseded, although those engaged in them will be subjected to the loss of their business and capital; and although valuable franchises previously conferred by the legislature in respect of such old modes, will be rendered unavailable and worthless.

There is no implication of an exclusive right to a franchise, where the charter or act conferring it, is silent on the subject.

A statute, authorizing an individual to erect a bridge, and to receive tolls for its use, confers upon him a franchise; and a substantial compliance with the conditions imposed by the act, will invest him with its rights and privileges.

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Where a franchise has become vested in the donee or grantee, it is no defence to a suit brought by him to assert or maintain the franchise, that he has forfeited it by any subsequent acts of commission or omission.

There must be a judicial forfeiture of the franchise, at the suit of the state, before individuals can avail themselves of such acts. It cannot be impeached collaterally.

Where an act conferring a franchise to build a bridge and to take tolls, provided that the owner of any unauthorized bridge or vessel used to transport passengers at the same point, should pay treble tolls, to be recovered by the donee in an action of debt before a justice; in a suit in equity by the owner of the bridge, against a corporation, for a violation of his franchise through a new bridge, alleged to be unauthorized;

Held, 1. That the remedy given by the act was cumulative, and did not preclude the donee from resorting to other actions.

2. If the act were otherwise, the necessity of the case would warrant another remedy, as the corporation could not be sued before a justice.

3. That chancery has jurisdiction to restrain by injunction, the unlawful use of the new bridge, at the suit of the owner of the franchise.

4. That chancery would not maintain a suit in his behalf for an account of the tolls lost through the use of the new bridge; but if a case were made for its interposition by way of injunction, it would decree an account as an incident to such relief.

5. That this court would not enforce the penalty provided by the act.

The proprietors of a toll bridge authorized by law, several years after the bridge was built, were incorporated by the legislature. There was no distinct evidence that they accepted the charter, there was proof of some of their own proceedings declining it; and in a *quo warranto* against them by the attorney general, for assuming to act as a body politic, they had traversed the allegation, and that officer had thereupon entered a judgment of preclusion.—*Held*, that these facts proved that they had not accepted the charter, and were conclusive on the point that they did not thereby become a body politic or corporate.

A rail road company was chartered with power to build a bridge for their railway across a river. At or near the place where it was to cross, a private bridge had been erected by individuals duly authorized by law, to build a bridge for their own private use, which was entirely convenient, and of sufficient strength for the purposes of the rail road; and the company purchased the bridge of the owners, reserving to the latter the use of it as before.—*Held*, that the owners were authorized to sell, and the company to buy the bridge.

A corporation authorized by law to build a bridge at a given point, may buy one already built at the same point, if suitable for their purpose.

February 17, 18, 19, 20, 21; July 21, 1846.

THE bill was filed September 16, 1843, by Samuel M. Thompson and others, as the proprietors of the toll bridge over the Harlem river at Harlem, against The New York and Harlem Rail

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Road Company, Gouverneur Morris, Lewis Morris, Gerard W. Morris, William H. Morris, Richard V. Morris, Henry Morris, and Richard L. Morris; for the purpose of restraining the defendants from violating the complainants franchise through and by means of the rail road bridge at Harlem, and for an account in respect of the loss of tolls occasioned to them thereby. The three defendants first named put in separate answers, and the other defendants joined in an answer to the bill. All the defendants set up objections to the complainants right, and justified the erection and maintenance of the rail road bridge; and they traversed the alleged loss of tolls to the complainants.

The pleadings and testimony were very voluminous. The questions presented by the pleadings, are mentioned in the opinion of the court. The following is a statement of the facts admitted and proved, by the respective parties.

In May, 1666, Governor Nicolls, by letters patent, granted to the freeholders and inhabitants of Harlem on Manhattan island, a tract of land on the Harlem river, and extending along the East river; and with other privileges, gave to them the right of maintaining a ferry to the main land. On the 7th of March, 1686, a confirmation of this patent was granted by Governor Dongan.

On the 25th day of March, 1676, Governor Andross, by letters patent, confirmed unto Col. Richard Morris, a tract of land, described as being upon the main over against the town of Harlem, containing 250 morgan or 500 acres, besides the meadow annexed, as butted in the original Dutch ground briefe; and by the same patent, granted to Col. Morris, a further tract adjacent to the former grant, containing fourteen hundred acres and extending from Harlem river to the Sound, and along Bronx Kill, On the 6th of May, 1697, Governor Fletcher, by letters patent, confirmed these grants, to Lewis Morris the nephew and heir of the former patentee, and erected the same into the lordship or manor of Morrisania in the county of Westchester; and among other rights and privileges, conferred on him the right of bridges and ferries.

On the thirty-first day of March, 1790, the legislature passed

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an act entitled, "An act for building a bridge across Harlem River," in the following words:

"I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That Lewis Morris, his heirs or assigns, be and he and they are hereby empowered and authorized at his and their own expense, to build a bridge from Harlem, across Harlem River, to Morrisania, agreeable to the dimensions and directions following, that is to say: The said bridge shall not be less than thirty feet in width, and between the centre arches thereof shall be an opening not less than twenty-five feet, over which shall be a draw not less than twelve feet; for the free passage of vessels with fixed standing masts; and that it shall and may be lawful for the said Lewis Morris, his heirs or assigns, for and during the term of sixty years, to ask, demand and take, for the use of the said bridge, a toll, not exceeding the following rates, viz.: For every four wheel pleasure carriage and horses, two shillings; for every two wheel pleasure carriage, or sleigh and horses, one shilling; for every wagon and horses, nine pence; for every market sled and horses, nine pence; for every ox cart and oxen, nine pence; for every one horse cart and horse, six pence; for every man and horse, six pence; for every ox, cow or steer, two pence; for every sheep, hog or calf, one penny; for every single passenger, three pence.

II. And be it further enacted by the authority aforesaid, That it shall not be lawful for any person or persons whatsoever, to erect or cause to be erected any other bridge over or across the said Harlem River to Morrisania, or to keep any scow, flat or other vessel, to ferry any person over or across the said Harlem River from Morrisania to Harlem, except for the private use of the inhabitants of the townships of Harlem and Morrisania; and if any such bridge shall be erected, or such scow, flat or other vessel be used as aforesaid, except by the inhabitants of the said townships of Harlem or Morrisania, the owner of such bridge, scow, flat or other vessel, shall pay to the said Lewis Morris, his heirs, executors, administrators or assigns, treble the toll hereinbefore specified, to be recovered in any suit or action of debt, before any justice or justices of the peace having cognizance of the same."

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The act then provided for the laying out of a road by commissioners, from the bridge to Eastchester, the particulars of which are unimportant. (Laws of 13 Sess. Chapt. 37; 2 Kent & Radcl. 489.)

Lewis Morris assigned all his rights under this act, to John B. Coles, prior to 1795; and on the 24th of March, 1795, the legislature passed an act, entitled "An act to enable John B. Coles to raise a dam across Harlem River, and to amend an act entitled 'an act for building a bridge across Harlem River,'" which is in the words following, to wit:

"Whereas, in and by an act, entitled an 'act for building a bridge across Harlem River,' passed March 31st, 1790, Lewis Morris, his heirs and assigns, were authorized at his and their own expense to build a bridge across Harlem River, agreeably to the directions and dimensions therein specified, and for the term of sixty years, to ask, demand and take, for the use of the said bridge, a toll not exceeding the rates in the said act mentioned: And whereas the said Lewis Morris hath assigned his right to build the said bridge, and proposals have been made by John B. Coles to the assignees of the said Lewis Morris to raise a dam of stone for the purpose of erecting mills thereon, and to be the foundation of the bridge aforesaid: therefore,

I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, that John B. Coles, his heirs and assigns, shall be, and he and they are authorized to build a dam across Harlem River, at such place as is or shall be determined on by the assignees of the said Lewis Morris, in pursuance of the act above recited; and such dam shall be made of stone, and shall be so constructed as to be the foundation of the bridge aforesaid, and for collecting the water of the said river for the use of grist and other mills.

II. And be it further enacted, that the said John B. Coles, his heirs or assigns, at his and their own expense, shall make and keep in repair a lock, and shall provide and keep a sufficient person to attend the same, that no unnecessary delay may happen to those who may have occasion to pass through the said lock with boats; that the width of said lock be eight feet, and so

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constructed as that a vessel drawing two feet of water may at low water enter such lock, and that the length be forty feet.

III. And be it further enacted, that all persons whose meadows and sedges may be injured, damaged or destroyed by the water so ponded up as aforesaid, shall be paid the amount of the damages he, she or they may so sustain, in the manner following: the amount of the damages that so as aforesaid shall be sustained, shall be determined, set and appraised by two justices of the peace, and by the oath of twelve freeholders not having any interest in the premises; and the said freeholders shall be summoned by a constable of the town or ward in which such damages shall have been sustained, by virtue of a warrant to be issued by the said two justices of the peace for that purpose, on the application of any person sustaining damages as aforesaid; the whole of the said damages, together with the charges of the said justices and jury, and of the whole proceedings thereon had, if any damages shall be found, shall be paid by the said John B. Coles, his heirs or assigns, within thirty days after notice to him or them given of the inquisition so taken as aforesaid.

IV. And be it further enacted, that in case the said John B. Coles, his heirs or assigns, shall neglect to keep the said lock in sufficient repair, or to furnish such attendance thereat, as to prevent the free passage of boats, he or they shall for every such neglect forfeit the sum of two pounds, to be recovered, with costs of suit, before any justice of the peace by any person who will prosecute for the same.

V. And be it further enacted, that the said bridge shall not be less than twenty-four feet, any thing in the act above recited to the contrary notwithstanding.

VI. And be it further enacted, that the said John B. Coles, his heirs and assigns, shall give security to the treasurer of this state in the penal sum of four thousand pounds, conditioned that he or they shall erect and complete the said bridge within four years after the passing of this act; and that he or they will preserve the same in good and sufficient repair during the term of sixty years after the building and completing of said bridge; and at the expiration of which term of sixty years, the said bridge shall vest in and become the property of the people of this state.

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VII. And be it further enacted, that from and after the expiration of the said sixty years, the said John B. Coles, his heirs and assigns, for ever, shall have, hold and enjoy the use of the waters so ponded up for any mill or mills which he or they or any of them may have erected, or shall erect, and also the use of the aforesaid dam, provided that he or they shall keep in repair the said dam and lock, at his and their proper expense, and keep a person to attend the said lock in manner herein before mentioned." (18th Session, Chapt. 31 ; 2 Kent & R. 490.)

By virtue of these acts, John B. Coles in 1796, erected a bridge of wood, across the Harlem River, (which separates the city of New York from the county of Westchester,) having an opening of twenty-five feet in width, over which was placed a draw twelve feet wide for the passage of vessels with standing masts. The bridge itself was of the width of twenty-four feet. He also executed to the treasurer of the state, the bond required by the sixth section of the act of 1795. The stone dam mentioned in that act, was never erected. On the 8th day of October, 1796, Lewis Morris executed to Coles, a conveyance in due form, of all his rights to the toll bridge and the franchises granted by the act of 1790.

The road to Eastchester, provided in the act of 1790, was laid out ; but not being fully opened or made available, the legislature on the 30th of March, 1797, passed an act in these words, viz.

" An act for the relief of John B. Coles, and to provide for the laying out of new roads. Whereas John B. Coles hath erected a bridge across Harlem River, in pursuance of an act, entitled ' an act for building a bridge across Harlem River,' and another act, entitled ' an act to enable John B. Coles to raise a dam across Harlem River, and to amend an act, entitled an act for building a bridge across Harlem River.' And whereas it is represented to the legislature, that although the commissioners named for that purpose in the first above mentioned act, had laid out a road from the said bridge to Eastchester, yet the damages to the persons through whose land it was laid out, are not paid, and some part of the said road is not opened ; and that the said John B. Coles has already expended a considerable sum of money in

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making, clearing and amending the said road; and that it will require further large sums for that purpose, besides what can be done in the ordinary mode of making and repairing highways in this state. And whereas the said John B. Coles hath prayed relief in the premises. Therefore,

I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, That the said road so laid out shall be, and hereby is established as a public highway from and after the passing of this act; and shall and may be immediately opened as a public highway, although the damages to the persons, or any or either of them, through whose land the same is laid out, may not be paid. And it shall and may be lawful for the said John B. Coles and his assigns, at his and their expense, to cause the said road to be cleared and properly made, for the convenience of travellers, and all others having occasion to use the same road; and as soon as the same road shall be made and cleared as aforesaid, then and from thenceforth it shall and may be lawful for the said John B. Coles and his assigns, for and during the term of thirty years, to demand and take an additional toll for passing the said bridge, not exceeding fifty per cent. above what is allowed by the acts aforesaid, or either of them; and that the said John B. Coles shall, at his own expense, keep the said road in repair, during the term he shall exact any additional toll for passing the said bridge." (20th Sess., chapt. 63; 2 K. & R. 491.) The second section of this act was repealed the following year.

On the 3d of April, 1798, another act was passed by the legislature, as follows:

"An Act to amend the act, entitled An Act for the relief of John B. Coles, and to provide for laying out new roads.

I. Be it enacted by the people of the state of New York, represented in Senate and Assembly, That the term of thirty years, allowed in and by the act, entitled 'An act for the relief of John B. Coles, and to provide for laying out new roads,' shall be, and hereby is extended to the term of sixty years, from the thirty-first day of March last; and that so much of the said act as declares that the said John B. Coles shall, at his own expense, keep the road from the bridge across Harlem River to Eastchester in

repair, during the time he shall exact any additional toll for passing the said bridge, shall be, and the same is hereby repealed. Provided, nevertheless,

II. And be it further enacted, That the said John B. Coles shall lay out and expend, in repairing the said road, one hundred dollars, by the first day of July, in each year, during the term he shall exact or take an additional toll of more than twenty-five per cent. for passing over his bridge, in such manner that each of the towns of Westchester and Eastchester shall be benefitted thereby, in proportion to the work necessary to be done on the said road in each of the said towns; and shall render an account of the expenditure of the said one hundred dollars to the commissioners of highways of the towns of Westchester and Eastchester, on or before the first day of September, in every year." (21st Sess., Chapt. 76; 2 K. & R. 492.)

In an act, passed April 8th, 1813, authorizing the erection of what is called Macomb's dam across the Harlem River, it is provided that nothing therein contained should be construed to affect, injure, or impair any rights, property or privilege, which might be then vested by law, and subsisting in John B. Coles, or in any other person or persons claiming under him, or in the Harlem River Bridge Company. (Laws of 1813, p. 237.) And a similar provision was inserted in the acts of May 9th, 1836, and May 15th, 1837, hereinafter stated.

On the first day of July, 1804, John B. Coles divided his interest and franchises in the toll bridge, into shares; and sold, transferred and conveyed portions of such shares, to different individuals. From that time, the proprietors of the bridge were usually called the Harlem Bridge Company. The complainants were the owners by purchase and otherwise, of the shares so originated by Coles, including those he retained. In his conveyances of the toll bridge shares, Coles reserved to himself the right to erect the dam provided in the act of 1795, and all other rights, except the toll bridge and its appurtenant liberties and franchises.

In 1808, the legislature passed an act incorporating the proprietors of the toll bridge by the name of *The Harlem Bridge*

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Company. (Private Acts of 1808, p. 66.) There was no distinct evidence that the proprietors applied for, or accepted the charter thus conferred. The complainants proved that the subject was presented to their consideration at a meeting on the 4th of January, 1809, when it was referred to a committee, who reported to another meeting on the 3d of February, 1809, against accepting the charter, and their report was agreed to. In answer to a communication from the State Comptroller in 1834, the proprietors replied that they were not incorporated, and claimed no privileges as a body politic.

In October, 1835, the Attorney General, on the relation of Thomas C. Taylor and others, filed in the supreme court, an information in the nature of a *quo warranto*, against the now complainants and others, then representing and owning the toll bridge or the principal part of it, alleging that the defendants in the information were exercising the privilege and franchise of being a body politic and corporate, by the name of the Harlem Bridge Company; and also the franchise of having and maintaining a toll bridge over and across the Harlem River, from the city of New York to the town of Westchester, without being legally incorporated, and without being authorized thereto by law. The proprietors of the bridge put in a plea, setting forth their rights under John B. Coles, and the acts of 1790, 1795, 1797 and 1798, before mentioned, recognized by the act of 1813, to have and maintain the toll bridge, and to take the tolls prescribed in the act; and they traversed the using of any of the corporate rights and privileges alleged in the information. There were many issues joined in respect of the toll bridge, and the right to maintain the same, which it is unnecessary to state. The Attorney General did not take issue upon the traverse of the fact, that they used the rights and privileges of a body politic and corporate, but reciting that they disavowed and disclaimed the same, prayed judgment of exclusion. The supreme court in June, 1839, rendered a judgment accordingly, adjudging that they do in no way intermeddle with such liberties, privileges and franchises of being a body politic and corporate, and of acting as such within this state, but that they be altogether excluded from the same.

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In support of the objections taken in the answers in this suit, to the complainant's rights, a mass of testimony was taken respecting the situation and condition of their toll bridge, and the opening left therein, and the draw for the passage of vessels. This testimony proved that since 1825, the opening had not been twenty-five feet wide ; and it tended to establish that it was not more than twenty or twenty-one feet in width ; that the bed of the river was obstructed in the opening, by stones thrown there to support the piers of the bridge, so that vessels could not go through except at high water, and that the draw was not maintained of the requisite width, and that the bridge itself was in a dilapidated condition.

On the 25th of April, 1831, an act of the legislature was passed, entitled "An act to incorporate The New York and Harlaem Rail Road Company," by which that company was incorporated, with power to build and maintain a railway with a single or double track, from any point on the north bounds of Twenty-Third street in the city of New York, to any point on the Harlem River, between the east bounds of the Third Avenue and the west bounds of the Eighth Avenue ; to be used with steam, mechanical and animal power, or any or either of them. The act authorized the corporation to enter upon and take all such lands and real estate as might be indispensable for the construction and maintenance of their railway, on making compensation therefor, in the manner prescribed ; and to intersect or cross any stream of water, or any street, road or highway, whenever it should be necessary for such construction. (Laws of 1831, Chapt. 263, p. 323.)

Under this act, and within a year from its passage, the Harlem Rail Road was laid out upon the centre of the Fourth Avenue ; and by virtue of this and several subsequent statutes, was constructed prior to 1840, with a double track, from the City Hall of the city of New York to the Harlem River, at the northerly termination of the Fourth Avenue, opposite to Morrisania, and about one-fourth of a mile northerly from the Harlem Bridge, which crossed the river at the northerly termination of the Third Avenue : The track of the railway having been

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extended from Twenty-Third street, southerly through Fourth Avenue, the Bowery, Broome street and Centre street, to the City Hall.

On the 17th day of April, 1832, the legislature chartered The New York and Albany Rail Road Company, with power to construct a railway betwixt the cities of New York and Albany, commencing on the island of New York where the Fourth Avenue terminates at the Harlem River, and passing through the counties of Westchester, Putnam, Dutchess, Columbia and Rensselaer, and ending on the Hudson River, opposite or near the city of Albany. The company were authorized to construct a single, double, or treble way or road, and to use it with steam, mechanical and animal power, or any or either of them. Also, to enter upon and take such lands and real estate, as might be indispensable for the construction and maintenance of their railway, on making compensation as provided in the statute; and to intersect or cross any stream, road, or highway, that might be necessary for such construction. (Laws of 1832, Chapt. 162, p. 258.)

This act was amended on the ninth of May, 1836. The time for commencing the New York and Albany Rail Road was extended, and the company was authorized, after completing thirty miles of the railway in the county of Westchester, to commence it on the island of New York. The fourth section contained a provision in these words; "and nothing in this act shall be so construed as to infringe such rights and privileges as the Harlem Bridge Company possess, by virtue of any statute of this state; nor shall any construction be given to this act to confer any rights or privileges on said Harlem Bridge Company, other than it now has." The amendatory act repeated the authority to cross streams and water courses, and excepted the right to cross the Hudson river. (Laws of 1836, Chapt. 268, p. 373.)

The New York and Albany Rail Road Company organized or assumed to organize, under these statutes, and their rail road was laid out in part, commencing at the termination of the Harlem Rail Road, but no part of it was constructed by the former corporation.

On the seventh day of May, 1840, the legislature passed an

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act entitled "An act relating to the New York and Harlem Rail Road Company," the two first sections of which are in these words ;

"§ 1. The New York and Harlem Rail Road Company are hereby authorized and empowered to construct a rail road with a single or double track through the county of Westchester, commencing at the Harlem river, and extending with one line of road, from thence northwardly to an intersection of the New York and Albany Rail Road Company's line of road, at such point or place as may be mutually agreed upon by the said two companies ; and the right of extending a branch eastwardly to the line of the state of Connecticut, with the view of intersecting a line or lines of rail road from said state of Connecticut, as well as from the state of Massachusetts. But the said New York and Harlem Rail Road Company shall first construct the road to the north line of Westchester county, before constructing any rail road eastwardly to the line of the state of Connecticut. And for that purpose, the said company is authorized to construct a bridge across the Harlem River, in order to connect the New York and Harlem Rail Road, as now constructed, with the road authorized by this act, in such manner that the same shall have a draw not less than forty feet in width, for the free passage of vessels ; and shall not have more than three piers and two abutments in said river, and shall not in any way impair the navigation thereof ; and it shall be within the power of the legislature of this state to incorporate any other companies for the making of any rail roads eastwardly, through the county of Westchester, to the line of the state of Connecticut, notwithstanding the passage of this act.

§ 2. The New York and Harlem Rail Road Company, shall possess all the powers, and be subject to all the restrictions, that are contained in the several acts, authorizing the construction of the New York and Albany Rail Road ; but nothing in this act contained shall authorize the said rail road company to use any part of the road of the Westchester Turnpike Road Company, without their consent, unless upon paying the damages sustained by the said turnpike company by reason thereof, to be ascertained in the manner prescribed in relation to other lands to be used for the said rail road."

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Under the authority of these several acts, The Harlem Rail Road Company, immediately after the passage of the act of 1840, proceeded to construct a railway through the county of Westchester, adopting at its southern extremity, the line laid out by the New York and Albany Rail Road Company, commencing on the northeasterly bank of the Harlem River directly opposite the terminus of the original Harlem rail road. The route thus adopted, ran for the first thirty miles, through the centre of Westchester county, and when the bill was filed, the rail road had been completed and was in active operation for about six miles northwardly of the Harlem River, and trains for the conveyance of passengers, passed over it several times each day from the City Hall in New York, across the Harlem River to its northern termination. Besides which it transported freight daily, its whole length. At the time of the hearing, the rail road had been extended and was in like active use, for a distance of about thirty miles from the Harlem River, through the heart of the county of Westchester, and was in rapid progress towards the county of Putnam. When the bill was filed, the number of passengers who crossed the Harlem River daily in the cars of the Harlem rail road, was one hundred and upwards.

The motive power used on the rail road beyond the compact part of the city of New York, was steam; and the passenger cars were of a large and heavy construction, each containing accommodations for fifty or sixty passengers: And it was proved that the complainants bridge was not of sufficient size or strength to admit of the passage over it, of carriages of such weight as the engines and cars of the Rail Road Company. The cars commenced running across the river, about the twenty-first of September, 1841. The company built a depot for their own use, on the Morrisania side of the river, near the end of their bridge.

Prior in time to these events, was the passage of an act by the legislature, on the 15th day of May, 1837, entitled "An act to authorize the building of a private bridge across the Harlem River," which was in these words:

"§ 1. The inhabitants of the town of Westchester, in the county of Westchester, residing in that part of said town which was known and distinguished as Morrisania, on the thirty-first

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day of March, in the year of our Lord one thousand seven hundred and ninety, are hereby authorized to build a free bridge for their private use across the Harlem River, between Harlem and said Morrisania.

§ 2. Such bridge shall be constructed with a draw or slide for the passage of vessels with standing masts, and be so attended as not to obstruct or hinder the free passage of vessels navigating said river.

§ 3. The right herein granted, is to be taken in pursuance of and used in conformity with, the right reserved to the said inhabitants of Morrisania, in the act passed the thirty-first day of March, in the year of our Lord one thousand seven hundred and ninety, granting to Lewis Morris, his heirs and assigns, the right of a toll bridge across said river, entitled, "An act for building a bridge across Harlem River," and not otherwise.

§ 4. The legislature may amend or repeal this act." (Laws of 1837, p. 471.)

Under the authority of this act and the rights contained in the Morrisania patents, Gouverneur Morris and his associates, descendants of the patentee, and being freeholders or inhabitants of Morrisania, immediately erected a large and very substantial covered bridge across the Harlem River, from the northern termination of the Fourth Avenue in the city of New York, to the Westchester side of the river, and connected the bridge on that side by a new road, with the road leading from the complainants bridge into the county of Westchester. The bridge thus constructed, was built upon three stone piers, with two abutments, and had a draw which was forty-six feet wide between the stone piers and forty feet wide between the wood projections, when opened. From the time of its completion, it was used by the inhabitants of Morrisania, for their transit to and from the city of New York. Gates were erected at the end of the bridge which completely inclosed it, and a person was employed to prevent unauthorized persons from crossing the bridge.

On the tenth day of November, 1840, The New York and Harlem Rail Road Company entered into an agreement under seal, for the purchase of this bridge and the abutments, (if on trial, it proved to be of sufficient strength,) from Lewis Morris,

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Gouverneur Morris, Gerard W. Morris, Richard V. Morris, Henry Morris, William H. Morris and Richard L. Morris, who had built and then owned the same ; for the price of \$30,000, or the cost and interest, if they were less than that sum. The vendors reserving to the inhabitants of Morrisania, all their rights and privileges, which were conferred upon them by the act of May 15, 1837. And on the 17th day of August, 1841, (a trial of its strength proving satisfactory,) the bridge and abutments were conveyed to the rail road company, by the owners above named, reserving such rights and privileges of the inhabitants of Morrisania.

The Rail Road Company laid the track of their rail-way, on the floor of the bridge which had thus been erected by the Messrs. Morris, and it became a part of their rail road from the city of New York into the county of Westchester. The gentlemen who erected the bridge, and the inhabitants of Morrisania in general, continued to make use of the same bridge for their private purposes, as before. The Rail Road Company employed an attendant to prevent the passage of persons not in their employ, nor inhabitants of Morrisania.

In respect of the complainants bridge, it was shown that the Third Avenue which terminated at the bridge, was the great thoroughfare from the city of New York to the county of Westchester, and the adjacent country to the north and east. That the travel which formerly crossed the bridge was very great, especially in vehicles of all kinds ; and the bridge was extensively used for foot passengers, and animals led or driven, which were subject to the payment of tolls. That after the rail road commenced running their passenger trains into the county of Westchester, the travel of all descriptions over the complainants bridge, was seriously diminished, and their receipt of tolls reduced about one-third ; and the further extension of the rail road, it was supposed, would still farther affect the receipt of tolls at their bridge, and injure the complainants property therein to an irreparable extent. They contended that from the mode of travelling and freighting on the rail road, it was and would be impracticable for the complainants to ascertain with precision, the extent of their loss and damage by means of the rail road company's crossing and using the Morris bridge. They also contended, and gave evidence to

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prove, that ever since the construction of that bridge, both the Morris's while they controlled it, and the rail road company after the sale to them, had so negligently or improperly guarded and taken care of that bridge, that it had been constantly made use of by persons on foot, in vehicles, and with animals, who had no right to cross it, and who thereby evaded the payment of the tolls which they ought to have paid to the complainants. The testimony on this subject, failed to establish any such negligence or omission on the part of the Messrs. Morris; but it proved that in some instances, the charge against the rail road company in this particular was well founded.

The latter company insisted in their answer, that the complainants were precluded from interfering with the use of the new bridge, because they had raised no objection nor given any warning to the company, although they had looked on and seen the company expending a very large sum of money in constructing the extension of their rail road, which extension, would be utterly useless, without the bridge in question."

C. B. Moore and *S. Stevens*, (with whom was *E. Coles*,) for the complainants.

Mr. Moore submitted the following points and authorities :

I. The right granted to L. Morris, his heirs and assigns, by the act of 1790, was an exclusive right to maintain a bridge over Harlem River, and to receive the tolls therein specified, for sixty years.

1. The act by its terms was exclusive.
2. But if it were not so expressed in the act, the grant of tolls necessarily excluded all competition which would diminish the tolls. (*Newburgh Turnpike Co. v. Miller*, 5 J. C. R. 101, 106, 112; *Livingston v. Van Ingen*, 9 J. R. 568, 573; *Ogden v. Gibbons*, 4 J. C. R. 161.)

II. The complainants, as assignees of John B. Coles, the assignee of Lewis Morris, are entitled to the franchise; and all the conditions precedent to the vesting of the exclusive right, were complied with, and have been repeatedly acknowledged by the

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legislature to have been complied with. (Acts of 1790, 1795, 1797, 1798, before mentioned. *The People, ex rel. Taylor v. Thompson and others*, 21 Wend. 235; reversed in the Court of Errors, 23 *ibid.* 537.)

III. It was not in the power of the legislature after granting that franchise to Morris, to re-grant any part of it to any other person, or make any other grant, or give any other privilege, which would prevent or impair the full enjoyment of the franchise during its continuance. (3 Kent's Com. 458, 9; 2 Bl. Com. 37; *Rex v. Cambridge, Vice-Chancellor*, 3 Burr. 1656; *Wales v. Stetson*, 2 Mass. R. 146; *Crittenden v. Wilson*, 5 Cowen, 165.)

It is no excuse or justification for the erection of a new bridge or ferry, which interferes with one previously granted, that it was erected by the King's license. (Hardres. Rep. 163; *Rex v. Sir Oliver Butler*, 3 Lev. 221; *S. C.* 2 Ventris, 344; *Yard v. Ford*, 2 Saunder's Rep. 172; 2 Institutes, 406.)

The act granting the franchise, the acceptance by Lewis Morris and his assignee, John B. Coles, the undertaking to comply with its terms, and in this case the actual building the bridge, and thereby the payment of a valuable consideration, constituted a contract, which by the Constitution of the United States, the legislature could not, directly nor indirectly impair; and which would be infringed by the grant of a franchise to compete with it. (6 Crauch, 87; 7 *ibid.* 164; 9 *ibid.* 49; *Dartmouth College v. Woodward*, 4 Wheaton, 516; *Green v. Biddle*, 8 *ibid.* 84; *Wyman v. Southard*, 8 *ibid.* 50.)

IV. The exception to the exclusive grant to Lewis Morris, in the act of 1790, did not authorize the inhabitants of Harlem and Morrisania to build a bridge across Harlem River for any purpose.

V. But if the exception permitted the legislature to pass the act of 15th May, 1837, authorizing the inhabitants of that part of the town of Westchester, which in 1790 was called Morrisania, to build a free bridge for their own private use, the legislature had not the power to authorize any other ferry or bridge over the river, for any purpose whatever.

VI. The act of 1837, does not authorize a bridge to be erected

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for sale, nor for any purpose but the exclusive private use of the inhabitants of Morrisania. No purchaser of it can appropriate it, or suffer it to be appropriated to any other use. The Rail Road Company, therefore, have acquired no title to the new bridge, and have no right to use, or suffer it to be used for any purpose, unless it be the exclusive private use of the inhabitants of Morrisania.

VII. The act of 7th May, 1840, (Laws of 1840, p. 190,) authorizing the Rail Road Company to build a bridge across the river, is a violation of the franchise vested in the complainants, and as against them is entirely nugatory.

VIII. The erection and use of the new bridge by the defendants, so near and creating so injurious a competition to the bridge of the complainants, affording facilities to every traveller to shun the complainant's bridge, which he would otherwise pass; is in respect to the complainant's franchise, a *nuisance*; and this court will grant a perpetual injunction to secure the enjoyment of the complainant's franchise. (*Newburgh Turnpike Co. v. Miller*, 5 J. C. R. 101.)

IX. The objection, that the complainants can only obtain redress by action of debt before a justice, cannot prevail.

The Rail Road Company being a corporation, cannot be sued before a justice.

The right to sue before a justice for treble toll, was given as a cumulative remedy; is of a penal character; and no other remedies are excluded by it. (*Crittenden v. Wilson*, 5 Cowen, 165.)

X. The remedy at law is altogether inadequate and inappropriate; and the necessity of resorting to this court, quite palpable. It cannot decline jurisdiction.

XI. The act of incorporation of 1808, has nothing to do with the matter. It was not accepted, nor acted under; was always disclaimed, and there is a judgment of preclusion against any possible right under it.

XII. The objections relative to the width of the opening of the draw, the depth of water in the draw, and the detention of vessels, are of no avail.

(a) They seek to establish a forfeiture of rights once duly vested, and founded upon a valuable consideration; and such

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forfeiture cannot be set up and tried in this collateral way. (23 Wend. 579, 585, *Thompson v. The People*, before cited.)

(b) They relate to the navigation of the river, with which the defendants, as owners of the other bridge, have no concern.

(c) They are not set up in the answers in such manner, as to be entitled to much consideration.

(d) They are not sufficient in themselves to justify the entire destruction of complainant's rights and privileges, or the withholding of the relief they seek.

(Authorities on this point, Com. Dig., Franchise, G. 3 ; 23 Wend. 193 ; 5 Mass. 230 ; 6 Cow. 23 ; 8 Wend. 645 ; 23 *ibid.* 255 ; 5 J. C. R. 101 ; 23 Wend. 222 ; 23 *ibid.* 537.)

XIII. The complainants are entitled to an account against the defendants for the loss of toll, and to costs.

Mr. *Stevens*, in reply, also referred to opinions of McLean, J., (11 Peters, 588, 647 ;) Story, J., (pp. 603, 616, 7, 646, 7 ;) and Thompson, J., in *S. C.* ; also 11 Peters, 568, 9, 637, 638, 641, 608, 546, 7, 623, 624 ; *Beatty v. Knowles, Lessee*, (4 Peters, 168 ;) *Providence Bank v. Pitman*, (4 *ibid.* 514 ;) 21 Wend. 235 ; 23 *ibid.* 537 ; 9 *ibid.* 351 ; 8 *ibid.* 645 ; Ang. & Ames on Corp. 507, 8 ; 3 Kent's Com. 459 ; 5 Price, 473 ; 15 Wend. 267 ; 18 *ibid.* 1.

C. W. Sandford and *B. F. Butler*, for the New York and Harlem Rail Road Company, argued the following points :

I. The complainants are not the assignees of Lewis Morris, and if they are such assignees, they have no title to maintain the bill in this cause.

(Under this point, reference is made to the points in behalf of Messrs. Morris.)

II. The New York and Harlem Rail Road Company, whether their purchase of the new bridge by the indenture of the 17th August, 1841, was authorized by the act of the legislature or not, do not, by their use of said bridge, violate, infringe or interfere with the franchise granted to Lewis Morris by the act of the 31st of March, 1790 ; and the complainants, admitting them to be the assignees of Lewis Morris, and admitting also that the

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franchise granted to him is yet in existence, have no title as against the Rail Road Company, to the relief sought by the bill.

1. The franchise granted by the act of 1790, was merely that of erecting and maintaining an ordinary bridge, in connection with a common highway, adapted to the passage of vehicles, horses, cattle, and foot passengers, in the manner and according to the usage of that day.

The franchise of erecting and maintaining a bridge as part of a rail road, was neither granted, contemplated nor foreseen, at the time of the passage of that act.

2. The bridge of the New York and Harlem Rail Road Company being used by them as a part of their rail road for the passage of their cars, and for that purpose exclusively, is not an interference with the franchise of the complainants. The cars of the company are neither pleasure carriages, wagons, nor carts, within the meaning of the act of 1790; nor are the passengers conveyed in such cars, such passengers as are intended by that act. (*Lansing v. Smith*, 8 Cowen, 146; *S. C. in Error*, 4 Wend. 9.)

III. The use of said bridge, under and by means of the indenture of 17th August, 1841, is agreeable to and authorized by the act of the 7th May, 1840, empowering the Rail Road Company to construct a bridge across the Harlem River; and even if otherwise, it is not for the complainants to interfere.

1. This bridge was lawfully erected by the inhabitants of Morrisania, under the act of the 15th May, 1837; which act was fairly within the exception contained in the act of 1790, and therefore constitutional and valid. (*Charles River Bridge v. Warren Bridge*, 11 Peters, 420, 546 to 553, opinion of Taney Ch. J.; *Cayuga Bridge Company v. Magee*, 2 Paige, 116; *S. C.*, 6 Wend. 85; *Mohawk Bridge Co. v. Utica and Schenectady R. R. Co.*, 6 Paige, 564.)

2. The bridge being lawfully in existence at the place in question, it was not only competent for the Rail Road Company to contract for its use, as a part of their rail road, but such contract was in furtherance of the interest of the public and the intent of the legislature; because less injurious to the navigation

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than the erection of a new bridge. (Acts of 1831, 1832, 1836, 1837, 1840, before mentioned. *People v. Rensselaer and Saratoga R. R. Co.*, 15 Wend. 129, 130.)

3. The purchase of the bridge, is a substantial compliance with the provisions of the act. And if not, it is for the state, and not for the complainants, to take advantage of the defect. (*Thompson v. The People*, 23 Wend. 537; Francis's *Maxims*, 62 to 71; 8 Wend. 645; 1 Paige, 102; 4 *ibid.* 481; 9 Wend. 351, 381; 4 Gill & Johns. 1; 3 Stark. Ev. 1249.)

IV. The act of 7 May, 1840, was a constitutional and valid law.

1. It does not in any way, violate, infringe or interfere with the franchise of the complainants, nor injuriously affect its value.

2. If the value of complainants franchise be impaired by the law of 1840, still this does not impair the obligation of the contract made by the state with Lewis Morris; because there is nothing in that contract to deprive the people of this state, of the benefits of the new system of intercommunication introduced by the invention of rail roads, nor to forbid the passage of a law authorizing the construction of a rail road bridge at the place in question. (11 Peters, 420.)

3. It was not in the power of the legislature of 1790, to make a contract which should have the effect of taking from their successors, the right of opening any such new methods and channels of communication, as such successors might deem essential to the comfort, convenience and prosperity of the people. (*Britton v. Mayor, &c. of New York*, Ms. in Supreme Court; and the cases cited on Mr. Rutherford's points.)

V. The complainants having silently stood by, and permitted the rail road company to expend large sums of money in constructing their road in the county of Westchester and in connecting it with the bridge in question, are estopped from now asking the interposition of a court of equity. (*Storrs v. Barker*, 6 J. C. R. 166; 1 Story's Eq. Jur. 375, 379, § 385, 390.)

W. Rutherford and *Geo. Wood*, for the defendant, Gouverneur Morris.

Mr. Rutherford argued upon the following points.

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I. The remedy prayed for by the bill of complaint in this cause, is not the proper remedy, and the court of chancery has no jurisdiction.

(Eden on Inj. 304; *Livingston v. Van Ingen*, 9 Johns. 585, per Kent, C. J.; *Hart v. Mayor of Albany*, 3 Paige, 213; S. C. in the Court of Errors, 9 Wend. 570; *Bronson v. Kinzie*, 1 Howard, 311; *McLaren v. Pennington*, 1 Paige, 102; *Livingston v. Tompkins*, 4 J. C. R. 431; *Cayuga Bridge Co. v. Magee*, 2 Paige, 166; *Sprague v. Birdsall*, 2 Cowen, 419; *Sharpe v. Spicer*, 4 Hill; 3 Kent, 459, 5 Ed.; Castle's case, Cro. James, 646; *Stevens v. Watson*, 1 Salk. 45; 2 Salk. 460; 1 Saunders 135, note, cases therein cited; *Rex v. Robinson*, 2 Burr. 799; 3 Burr. 1707; *Miller v. Taylor*, 4 Burr. 2303; Dwarries on Statutes, 33; *Almy v. Harris*, 5 Johns. 174; *Clark v. Brown*, 18 Wend. 220; *Stafford v. Ingersoll*, 3 Hill, 41; *Calkins v. Baldwin*, 4 Wend. 667; *Bailey v. Mayor of New York*, 3 Hill, 538; 1 Kent, 467, 5 Ed.; Cases cited in *Livingston v. Van Ingen*, 9 Johns. 506, 507; *Croton Turnpike Co. v. Ryder*, 1 J. C. R. 611; *Attorney General v. Utica Insurance Co.*, 2 J. C. R. 371; *Newburgh Turnpike Co. v. Miller*, 5 *ibid.* 101; *Gibbons v. Ogden*, 17 Johns. 488; 18 Wend. 220; Gregory's Case, 6 Coke Rep. 20; *Rex v. Buck*, 1 Strange, 679; *The King v. Stevenson*, 2 East 362; Dwarries on Statutes, 34, 86, 77; *Parsons v. Barnard*, 7 Johns. 144; *Gibson v. Woodworth*, 8 Paige, 132; Acts of 1790, 1795, 1797, 1798, 1808. That the act of 1790, was unconstitutional, see *Presb. Church v. City of New York*, 5 Cowen, 538; *Stuyvesant v. The Mayor, &c. of N. Y.*, 7 Cowen, 605; Opinion of Taney, now C. J.; Camden & Amboy R. R. Case, Niles Register, Nov. 2d, 1833; *Mayor, &c. of New York* ads. *Britton*, the Street Sweeping contract, per Nelson, Ch. J.; 23 Wend. 205, 206; Opinion of Verplank & Edwards, 23 *ibid.* 599; *Kearsey v. Pruyn*, 7 Johns. 179; *Stratton v. Herrick*, 9 Johns. 356; *Griffin v. Horne*, 18 Johns. 357; Angell & Ames on Corp. 145; *New York Fire Ins. Co. v. Ely*, 5 Cowen, 568; *Gallini v. Laborie*, 11 East, 180; *The Newburgh Water Power Case*, 2 J. C. R.; 7 New Hampshire Rep. 66.) As to the remedy see further, *Semple v. London and*

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Birmingham Rail Road Co., 1 Railway Cases, 133; *Great Western R. R. Co. v. Tapster*, 2 *ibid.* 591.

II. The proper parties complainants, are not before the court.

1st. Because John B. Coles expressly reserved this franchise to himself and his heirs. (*Nicol v. Trustees of Huntington*, 1 J. C. R. 166; a particular specification will exclude things not specified; *Grant v. Chase*, 17 Mass. Rep. 443; *West Boston Bridge v. County Commissioners*, 10 Pick. 272.)

II. Because the complainants are an incorporation, incorporated under an act of the legislature of 1808.

(*Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Riddle v. Proprietors of Locks on Merrimack River*, 7 Mass. 187; *Bank of U. S. v. Dandridge*, 12 Wheat. 71; *Russell v. McClellan*, 14 Pick. 53; *Rex v. Basey*, 4 M. & S. 255; *Angell & Ames on Corp.* 55.)

III. The Morris's are not the owners of the new bridge, and therefore not liable. (3 Kent, 5 Ed. Lecture 53; *Bloodgood v. Mohawk and Hudson R. R. Co.*, 18 Wend. 42; Act of 1837; Act of 1840; *Steel v. Western Inland Lock navigation Co.*, 2 Johns. 286; *Case v. Thompson*, 6 Wend. 634; *Rogers v. Bradshaw*, 20 Johns. 738.)

IV. That the new bridge, being used for a purpose not known of by the legislature, at the time the act of 1790, was passed, and not directly conflicting with the franchise therein granted, the owners are not liable.

(Dwarris on Statutes, Tit. Construction; *Charles River Bridge Case*, 11 Peters, 420; *Dyer v. Tuscaloosa Bridge*, 2 Porter's Alab. Rep. 296; *Tucahoe Canal Co. v. Tucahoe Rail Road*, 11 Leigh, 42; *Cayuga Bridge Co. v. Magee*, 2 Paige, 116; *Sprague v. Birdsall*, 2 Cowen, 419; *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.*, 6 Paige, 554; 3 Kent, 459, 5 Ed.; *Rogers v. Bradshaw*, 20 Johns. 735; *United States v. Kimball*, Law Reporter for May, 1844, per Judge Sprague, confirmed by Judge Story; also S. P. by Judge Conkling; *Rex v. Handy*, 6 T. R. 286.)

V. The complainants having allowed the Harlem R. R. Company to expend a large sum of money, without objection, under

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the act of 1840, are estopped from setting up a claim for damages.

(*Earl of Ripon v. Hobart*, 3 Mylne and Keen, 169; *Birmingham Canal Co. v. Loyd*, 18 Ves. 515; 6 Paige, 554, 563; *Scudder v. Trenton and Delaware Falls Co.*, Saxton's Ch. R. 694, N. J.; *Reid v. Gifford*, 6 J. C. R. 19; *Storms v. Mann*, 4 *ibid.* 26; *Pillsworth v. Hopton*, 6 Vesey, 51; *Van Bergen v. Van Bergen*, 3 J. C. R. 287; *Greenhoff v. Manchester and Birmingham Rail Road Co.*, 1 Railw. Cases, 68; *Iltingworth v. Manchester and Leeds Rail Road Co.*, 2 *ibid.* 209.)

VI. The evidence shows that the bridge has been only used by the cars belonging to the Harlem Rail Road Company, and the inhabitants of Morrisania.

VII. That the inhabitants within the limits of Harlem, as it was in 1790, are entitled to cross said bridge. (See Old Harlem Patent.)

VIII. There is no equity in the bill. (4 Bacon's Abrid. p. 154, Title, Franchise; 3 Black. Com. 219; *Yard v. Ford*, 2 Saund. 172; *Blissett v. Hart*, Willes, 512; *Tripp v. Frank*, 4 T. R. 666; Eden on Inj. 271; *Lessees of the Dean and Chapter of Durham*, 1 Ves. Sen. 476; *Prince v. Lewis*, 5 Barn. & Cress. 363; *The King v. Pease*, 4 Barn. & Adolph. 17; *Boston Water Power Co. v. The Boston and Worcester Rail Road Corporation*, 23 Pick. 360.)

There is no instance of the court holding a nuisance without a trial. (18 Ves. 220; New York Legal Observer, May, 1845, p. 26; *Bonaparte v. Camden and Amboy R. R. Co.*, 1 Bald. C. C. R. 205.)

G. W. Morris, in person, and for Richard V. Morris, William H. Morris, Henry Morris and Richard L. Morris, argued upon the following points:

I. The remedy prayed for in the bill of complaint in this cause is not the proper remedy, and the court of chancery has no jurisdiction. (*Eckford v. Hood*, 7 T. R. 620; *Hinsdale v. Larned*, 16 Mass. 65; *Almy v. Harris*, 5 Johns. 175; 6 Paige,

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565; 3 *ibid.* 213; 9 *Wend.* 570; 18 *Ves.* 515; 1 *Metcalf*, 216; 3 *Bl. Com.* 437; 3 *Woodd. Lect.* 83; *Jacob's Law Dict. Tit. Account.*)

II. The proper parties, complainants, are not before the court.

1. Because John B. Coles expressly reserved this franchise to himself and his heirs—his heirs must sue.

2. Because the complainants are an incorporation, incorporated under an act of the legislature in 1808.

III. That the Morris's are not the owners of the new bridge, and are therefore not liable. (*People v. Rensselaer and Saratoga R. R. Co.*, 15 *Wend.* 114.)

IV. That the new bridge being used for a purpose not known of by the legislature at the time the act of 1790 was passed, and not directly conflicting with the franchise therein granted, the owners are not liable. (*Charles River Bridge Case*, 11 *Peters R.* —.)

V. The complainants having allowed the Harlem Rail Road Company to expend a large sum of money without objection, under the act of 1840, are estopped from setting up a claim for damages.

VI. The evidence shows, that the bridge has been only used by the cars belonging to the Harlem Rail Road Company, and the inhabitants of Morrisania.

VII. That the inhabitants within the limits of Harlem, as it was in 1790, are entitled to cross said bridge.

VIII. There is no equity in the bill.

H. M. Morris, for the defendant Lewis Morris, relied on the points made by Messrs. Rutherford and G. W. Morris.

THE ASSISTANT VICE-CHANCELLOR.—All the defendants concur in making various objections to the complainant's right to maintain this suit, and I will first examine those objections without stopping to inquire which of the defendants has omitted to pave the way for them in his answer.

First. It is said that John B. Coles reserved the bridge franchise in his conveyance to the trustees, in 1804.

The fact is clearly otherwise. The franchise reserved, was that of erecting and maintaining a dam, which the supreme court

held, in the *quo warranto* case hereafter referred to, was entirely distinct from the erection of a bridge. And the whole object of the grant, was to convey the right to the bridge and the tolls.

Second. In 1808, the legislature passed an act incorporating the then owners of the Harlem Bridge, and it is insisted that the corporation alone can file a bill in respect of the franchises in question. The burthen of establishing the acceptance of the charter is upon the defendants, and the proof falls far short of making it out. This is sufficient to dispose of the point, but if the testimony were much stronger to prove the acceptance of the charter, I think that the judgment in the suit of the People, would be decisive in the complainants favor. The People, on the relation of Thomas C. Taylor and others, in 1836 filed an information, alleging amongst other things, that these complainants were exercising the franchise of being a body politic and corporate by the name of the Harlem Bridge Company, having usurped the same, and calling on them to show by what warrant they claimed to use and exercise such franchise. In their plea to the information, the now complainants alleged that they never used the franchise of a corporation. Upon this, the Attorney General, in behalf of the people took judgment of preclusion. These proceedings, while they preclude the complainants and the state from setting up that the former are a body corporate, ought certainly to prevent strangers from insisting the contrary, in a case where the question arises collaterally.

Third. The next objection led to the taking of considerable testimony. It is, that the complainants, and those preceding them in the ownership of the bridge, never complied with the conditions and requirements which formed the consideration of the several acts of the legislature; and that, if there were a sufficient compliance originally, they have forfeited their right to maintain their franchise, by neglecting for a long time to keep up the bridge and its appurtenances, pursuant to the terms of those acts.

The supreme court decided, in the *quo warranto* case before mentioned, that the act of 1795 modified the provisions of the act of 1790, in respect of the width of the Harlem Bridge, and that the privilege of erecting a dam, was an additional grant,

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which John B. Coles might either exercise or omit, without affecting his right to build the bridge. The court therefore held, that Coles had complied with the conditions of the grant contained in the acts authorizing the bridge, by the erection of one only twenty-four feet wide, although it did not rest on a stone dam, or foundation. It appears that the opening for vessels and the draw over the same, were originally made of the size prescribed by the act of 1790, and that John B. Coles executed a bond, in conformity to the sixth section of the act of 1795.

I have no doubt, therefore, that the conditions annexed to the franchise in the acts granting the same, were substantially performed by Coles and his associates, and that they became duly invested with the rights and privileges conferred by those acts.

Before investigating the grounds upon which it is alleged that the owners of the bridge have forfeited their franchise, I am met with a preliminary inquiry. Can these defendants be permitted to set up such forfeiture in answer to this suit?

Admitting for the sake of the argument, that the bridge as now maintained, is a public nuisance on account of its obstruction of the navigation, it is of no avail to the defendants, unless they can show that they are specially injured thereby. Now, it is not pretended that the closing of the opening and draw entirely, would affect the defendants at all. As a nuisance therefore, they are not in a position to complain of the bridge in a civil suit.

The ground taken by the defendants here, is not analogous to setting up, by way of defence to an action for tolls, by a turnpike or bridge company, that the turnpike or bridge is out of repair. Such a defence, while it shows that the company is not entitled to recover the tolls, does not interfere with the company's title to its franchise; and in a suit for tolls subsequently due, a judgment against the company in a former suit, would not prevent a recovery. The defendant would be compelled to prove a defence, as if no former suit had existed.

It cannot be shown in defence to the suit of a corporation, that the plaintiff's have forfeited their corporate rights by misuser or by non-user.

Advantage can be taken of such forfeiture, only on process on behalf of the state, instituted directly against the corporation, for

the purpose of avoiding the charter or act of incorporation ; and individuals cannot avail themselves of it in collateral suits, until it be judicially declared. (Angell & Ames on Corporations, 507 ; 2d Ed., and the numerous cases there cited. *Trustees of Vernon Society v. Hills*, 6 Cowen, 23 ; *Bank of Niagara v. Johnson*, 8 Wend. 645.)

The grants to Lewis Morris and John B. Coles by the legislature, were as much a franchise as is the power to act as a body corporate ; and must be forfeited judicially, before individuals can avail themselves of any misuser or omission to keep up their bridge in the manner prescribed by law. As to the nature of the grant, if any reference be necessary, see 3 Kent's Comm. 458, and *Thompson v. The People*, (23 Wend. 579, 580, 596, per Verplanck, Senator.)

It is therefore foreign to this case, to examine the alleged omissions of the complainants to keep up their bridge, and the opening and draw in the same, in the manner required by the acts authorizing its erection.

Fourth. It is insisted by some of the defendants, that the complainants, if they have any remedy, are restricted to the action of debt given by the second section of the act of 1790, against the owners of any bridge or vessel interfering with the enjoyment of their franchise.

One answer to this is, that the owners of the obnoxious bridge being a body corporate, no suit could be maintained against them in a justice's court at the time this cause was commenced.

The case of *Livingston and Fulton v. Van Ingen and others*, (9 Johns. 507, 562, 569, &c. 585, &c.) decides that the parties in possession of an exclusive right or privilege granted by a statute, are entitled to an injunction to restrain others from infringing that right, although the statute imposed various forfeitures on persons so offending.

This principle is sufficient to sustain the bill in its chief object, if the right claimed by it be found to exist in the complainants ; and as it may prove unnecessary to pursue the inquiry in respect of the claim made for an account, I will waive it for the present.

The other reasons assigned for the objection of want of equity

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in the bill, will be examined hereafter, if there remain any necessity for looking into them, after disposing of the more important points in the cause.

Next, as to the right of Lewis Morris, Gouverneur Morris and others, to erect the bridge which is the subject of complaint.

This is abundantly established by the grant in the *Morrisania* patents of 1676 and 1697, the express reservation in the act of 1790, authorizing the bridge of the complainants, and the statute passed May 15, 1837, enacting that the inhabitants of *Morrisania* might build a free bridge for their private use across the Harlem River, between Harlem and *Morrisania*.

Indeed, this right is not seriously disputed by the complainants, although they contend that the expensive bridge which was erected by the Morris's, was really intended for the use to which it has been subsequently appropriated. As to this, without noticing its materiality, it suffices to say that whatever those gentlemen might have *hoped*, they could not have relied upon transferring it to the Harlem Rail Road Company, for that corporation was not then empowered to cross the Harlem River.

I have now come to the grave and very important question, presented by the pleadings, viz., the right of the Harlem Rail Road Company, to purchase the bridge built by the Messrs. Morris's and to use it for the purposes of their railway.

The charter of this company, passed in 1831, authorized it to construct a rail road from Twenty-third street in the city of New York to the Harlem River, at any point between the Third and Eighth Avenues. (Laws of 1831, Ch. 263, p. 323.) The rail road was laid out upon the line of the Fourth Avenue, and prior to 1840, was finished and in active operation from the City Hall to the termination of the Fourth Avenue, at the southerly side of the Harlem River, directly at the point where the *Morrisania* bridge crossed the river.

In 1832, the New York and Albany Rail Road Company was incorporated, authorizing a railway from the city of New York (commencing where the Fourth Avenue terminates at the Harlem River,) to the city of Albany. (Laws of 1832, Ch. 162, p. 258.)

In 1836, this charter was amended, and the company empow-

ered to extend their rail road into the city of New York ; but nothing in the act was to be so construed as to infringe such rights and privileges as the Harlem Bridge Company possessed by virtue of any statute. The act authorized the company to construct their road across any streams which it might intersect, except the Hudson River. (Laws of 1836, Ch. 268, p. 373.) The same power was conferred by the original act of incorporation in 1832.

On the 7th of May, 1840, an act was passed, which authorized the Harlem Rail Road Company to construct a rail road through the county of Westchester, commencing at the Harlem River, and extending northwardly to meet the New York and Albany Rail Road Company, with a branch to the line of the state of Connecticut. The act authorized the Harlem Rail Road Company to construct a bridge across Harlem River, in order to connect their road as then built, with the extension permitted by that act. The second section provided that the company should possess all the powers, and be subject to all the restrictions, that are contained in the several acts authorizing the construction of The New York and Albany Rail Road Company, and prohibited them from using any part of the road of the Westchester Turnpike Company, except upon making compensation. (Laws of 1840, Ch. 242, p. 190.) Aside from the principal question involved, it is contended that inasmuch as the inhabitants of Morrisania could build a bridge for no other purpose than for their exclusive private use, they could not erect one for sale : No purchaser could acquire a right to appropriate the bridge when built, to any other use than that of those inhabitants : Therefore the Harlem Rail Road Company have acquired no title to the bridge by their purchase from the Morris's, and have no right to use it or to suffer it to be used, for any purpose except the private use of the inhabitants of Morrisania.

This argument might be indisputable if it were applied to an ordinary purchaser, or to a corporation having no authority to carry a rail road over the Harlem River. But these defendants were expressly authorized to cross the river with their railway in order to connect it as then built, with the Westchester extension.

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They were also empowered to purchase any lands or real estate, which were necessary for the construction of their road, and if the owners were unwilling to sell, the company could take such lands, on making compensation in the mode pointed out by the charter.

The bridge of the Morris's stood at the very spot where the defendants were required by the act of 1840, to cross the river to continue their rail road. Its materials and superstructure were the private property of the Morris's, although subject to the private use of the other inhabitants of Morrisania. The company had an undoubted right to take the bridge, whether the Morris's were willing or not, on making to them compensation for its value, and making a suitable provision for the use of it by them and the other inhabitants entitled to its benefit. Under these circumstances, it appears to me that nothing can be plainer than that the company had a perfect right to buy the bridge for the use of their rail road.

So far as the navigation of the river was concerned, it was far better for the public interest that there should be but one bridge, for the use of both the rail road and the inhabitants of Morrisania; and in respect of the complainants, it was no worse for them, but rather the contrary, because the use of the bridge by the railroad, would unavoidably interfere with its free and unrestricted use by the ordinary travel of the country.

The complainants insist further, that the act of 1840, authorizing the Harlem Rail Road Company to build a bridge across the river, is a violation of the franchise vested in them, and as against them, is entirely nugatory. They do not deny the power of the legislature to authorize the company to build such a bridge, but they contend that the legislature itself could authorize it, only upon making proper compensation to them for the consequent injury to their franchise.

These positions were very ably and earnestly argued by the learned counsel for the complainants; but in the present state of the law on the subject, as established in this court, it would be quite superfluous for me to enter into an elaborate discussion of the momentous principles involved in its consideration, or to examine critically the force, extent and authority of the leading

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case relied on by the defendants. (*Charles River Bridge v. Warren Bridge*, 11 Peters, 420.)

In *The Mohawk Bridge Company v. The Utica and Schenectady Rail Road Company*, (6 Paige, 554,) the complainant's charter prohibited others from establishing a ferry within one mile from their toll bridge. The defendants were authorized to construct a railway from Schenectady to Utica, which gave them the right to build a bridge across the Mohawk River for the passage of their engines and cars, and they commenced building it about a hundred rods distant from the plaintiff's bridge. The latter thereupon applied for an injunction, alleging amongst other grounds, that the rail road would divert the travel from their toll bridge, and thus interfere injuriously with the exclusive privilege secured to them by their charter. The chancellor declared his opinion, that the charter of the Mohawk Bridge Company did not deprive a future legislature of the right to authorize the erection of another bridge within the prescribed limits, whenever the public good should appear to require it; much less was the legislature deprived of the power to provide for the conveyance of freight or passengers from one part of the state to another, by an improvement which was entirely unknown at the time when the grant to the bridge company was made. And if that grant had in terms, given to the corporation the exclusive right of erecting a toll bridge across the river at Schenectady, this subsequent grant to the rail road company to cross the river with their railway from Schenectady to Utica, and to transport passengers thereon in the course of their business in the conveyance of travellers from one place to another, would not have been an infringement of the privileges conferred by such prior grant; as the rail road bridge would not be a toll bridge, within the intent and meaning of the grant to the first company. The motion for the injunction was denied on another ground, but it is evident that the chancellor would have denied it for the reasons just stated, if no other had existed.

More recently, in the case of *The Oswego Falls Bridge Co. v. Fish and others*, decided May 25th, 1846,^(a) the bill was filed

^(a) Now reported in 1 Barb. Ch. R. 547.

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to restrain the defendants from erecting a free bridge across the Oswego River, between the falls and the north line of the village of Fulton, which they were authorized to do as commissioners, by an act of the legislature passed in 1838. (Laws of 1838, Chapt. 254, p. 240.) The complainants toll bridge across the Oswego River, terminated about the centre of the village of Fulton, and the defendants had laid out the free bridge so that it would terminate within the village, near to the toll bridge. The act authorized the commissioners to purchase and repair the Oswego Falls bridge, instead of building a new bridge, if in their opinion, the public interest would be best promoted thereby. The charter of the Oswego Falls Bridge Company, (Laws of 1824, ch. 293, p. 351,) authorized them to erect a bridge over the Oswego River, and to receive tolls in the usual manner. Vice Chancellor Gridley of the fifth circuit, dismissed the bill. The complainants appealed, and the chancellor affirmed the decree. In his decision, he says, "The only question, therefore, is whether the legislature had the right to authorize the erection of a free bridge across the Oswego River, so near to the bridge which the complainants had erected under their charter, as to diminish their tolls and materially impair the profits of the company. I had occasion to consider the power of the legislature in this respect, incidentally, in the case of *The Mohawk Bridge Co. v. The Utica and Schenectady R. R. Co.*, (6 Paige's Rep. 554,) and I then came to the conclusion that the grant to a corporation to erect a toll bridge across a river, without any restriction of the power of the legislature to grant a similar privilege to others, would not deprive a future legislature of the power to authorize the erection of another bridge, which would divert a portion of the travel from the bridge which had been previously erected. Since that decision, we have been furnished with the reported case of the *Charles River Bridge Co. v. The Proprietors of the Warren Bridge*, (11 Peter's R. 420,) decided by the supreme court of the United States, a few months before. That case cannot be distinguished in principle from the present; and as the question was fully considered there, in the very able opinion of Chief Justice Taney, who delivered the judgment of the court, it would be useless to go over the same ground." The same

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point apparently, was decided by the Chancellor, in the case of *Meads, Receiver &c. v. Wardell*, April 2, 1844, (4th Barbour's Notes of Chancellor's Decisions, p. 14,) where the exclusive right was set up in respect of a ferry.

The second section of the act of 1790 for building the Harlem bridge, provides, that it shall not be lawful for any person or persons whatsoever, to erect any other bridge over or across the Harlem River to Morrisania, or to keep any vessel to ferry any person across the river from Morrisania to Harlem, except for the private use of the inhabitants of those townships. And the complainants insist, (to repeat their point,) that this is a grant and covenant on the part of the legislature, that it will not permit any person except those inhabitants, to erect any bridge or ferry, and those could erect one for their private use only. That the grant was by its terms exclusive, and if it were not so expressed, the grant of tolls necessarily excluded all competition which would diminish the tolls; and it was not in the power of the legislature, afterwards to make a grant which would impair the full enjoyment of the franchise conferred on the bridge, and any such grant would be void under the constitution of the United States, as impairing the obligation of the contract made by the state with the Harlem Bridge Company.

As to these positions of the complainants, the *Charles River Bridge* case, with that of the *Stourbridge Canal Company v. Whaley*, (2 Barn. & Ad. 792,) is decisive against any implication of an exclusive right, when the charter is silent on the subject; and the decisions of the chancellor to which I have referred, appear to me to be equally conclusive against any restriction of the power of the legislature to charter a new toll bridge, or to authorize a free bridge, in competition with that allowed across the Harlem River by the act of 1790. Other cases to the same effect, will be noticed hereafter. The act of 1790 does not declare that the legislature will not permit another bridge to be erected. Indeed, the declaration inserted in the second section, was evidently aimed at the rights which it was supposed the inhabitants of Morrisania and Harlem might claim under their old patents, rather than against any interference by others with the franchise granted to the bridge company. As to all persons,

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other than the inhabitants of Morrisania and Harlem, such a provision was wholly unnecessary, because no one could set up a toll bridge or ferry, without authority from the state.

The case of *The Newburgh Turnpike Co. v. Miller*, (5 J. C. R. 101,) cited by the complainants, does not conflict with these views. There, individuals without the sanction of law, laid out a road and built a bridge, the manifest effect of which was to enable travellers to evade the complainants bridge and toll gate; and the chancellor restrained them by injunction.

It was argued on the part of the defendants, that the rail road bridge, used merely for its appropriate purpose of passing their locomotive engines and trains of cars across the Harlem River, on their way from the city of New York to their various stopping places in Westchester county; does not violate, infringe, or interfere with, the franchise granted to the Harlem Bridge Company by the act of 1790. There is undoubtedly much force in this argument. The rail road bridge, *as such*, is incapable of being used for the passage of any vehicle, animal, or foot passenger, for whose passage the complainants are entitled to receive toll. The fact that the rail road bridge, *as built for the private use of the inhabitants of Morrisania*, may be crossed by such vehicles, &c., does not affect the consideration of this point.

On the other hand, the complainants bridge has not the capacity to pass over the Harlem River, any of the Rail Road Company's engines, or their trains or cars drawn by such engines. And if the complainants were to lay down a suitable railway track, and strengthen their bridge so that the engines and trains of the defendants might cross it, there is nothing in their charter which would warrant them in exacting toll from the defendants. (*Stourbridge Canal Co. v. Whaley*, above cited.) This demonstrates that the franchise granted to the defendants, is not the same as that vested in the complainants; nor is there such a similarity between them as renders the one an interference with the other, in the sense in which a new bridge or a ferry interferes with a prior one established at the same point.

The influence of the rail road on the complainants profits from their bridge, is more analogous to that which has been effected

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in respect of many branches of business, by the astonishing improvements of the last thirty years. The Erie canal broke up and destroyed the long lines of heavy teams which formerly monopolized the transportation west of Albany ; and diminished more than one-half, the profits of the turnpike companies between Albany and Canandaigua. The line of rail roads which succeeded, drove from the road the throng of stage coaches, which were profitably employed in the conveyance of passengers to and from the great west. Yet neither the army of teamsters thrown out of business, nor the turnpike corporations, ever claimed compensation from the state in respect of the Erie canal ; nor did the stage owners claim redress against the rail road companies, which destroyed their business, and diminished one-half, the value of their capital. If it be answered, that most of these were mere individuals, or the enterprises of men associated together, and not basking in the sunshine of legislative privilege ; I reply, that the turnpike companies were corporations, and that the others invested capital in a business, *quasi* public, and acquired a valuable good will in their pursuits, with as much claim on the favor and protection of the state, as the builders of the Harlem bridge ; with this difference only, that the latter had no right to set up their bridge without the permission of the state, while the pursuits of the former were open to all.

If then the progressive spirit of the age, have developed and matured a mode of conveying passengers and freights, from place to place, across rivers and over morasses, which was unknown in 1790 ; can there be any doubt that the legislature, in the exercise of its sovereign duty to provide ways for the use of the people, may authorize the construction and use of such new invention, although the necessary consequence may be, that the prior modes of conveyance will be superseded, and those who were profitably engaged in their pursuit, will be subjected to the loss of their business and capital ? I think the right and the duty of the legislature in such a case, is too clear to be questioned ; and that those who were enjoying franchises previously conferred, which are thereby rendered worthless, stand in no worse position and are no more entitled to sympathy or compensation, than the numerous classes of mechanics and other individuals,

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* \ who are daily subjected to great losses and sacrifices, by new inventions and improvements, superseding and destroying those in profitable use.

An analogous case in our own courts is that of *Lansing v. Smith and others*, (8 Cowen, 146, affirmed in 4 Wend. 9,) where the wharves of the owners of lots in the city of Albany, were rendered almost valueless, by the erection of the Albany pier, under an act of the legislature.

Previous to the decision of the Charles River Bridge case, the supreme court of New Hampshire held that the grant of a ferry, did not prevent the legislature from granting to another person, the exclusive right of erecting a toll bridge within certain limits, which included the place where the ferry was situated. And the court expressed their opinion, that were there no terms of exclusion in the grant of the bridge, another bridge might be authorized within the same limits. There being an exclusive grant of the bridge in that case, the court decided that the legislature could not authorize the erection of another bridge, without provision for the compensation of the first grantee. (*Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. Rep. 35, 59.)

And the supreme court of Alabama had held in 1835, that the grant of a ferry, where it was not exclusive, did not prevent the legislature from chartering a toll bridge near the ferry, without making any provision for compensation to the owner of the ferry. (*Dyer v. Tuscaloosa Bridge Company*, 2 Porter's R. 296.)

Subsequent to the case of Charles River Bridge, the court of appeals in Virginia, unanimously held that a monopoly cannot be implied, from the grant to construct a work of public improvement and to take the profits; to give such monopoly, there must be an express provision in the act or charter, whereby the legislature restrains itself from granting charters for rival and competing works. And the court applied the doctrine in a suit by a canal company, against a company subsequently chartered to construct a rail road along the same valley. (*Tuckahoe Canal Company v. Tuckahoe Rail Road Company*, 11 Leigh's R. 42, 69, 73.)

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Such being the established law on the subject, I must, on both grounds, decide against granting to the complainants any relief founded upon the assumption that the Harlem Rail Road Company have no right to maintain the bridge in question across the Harlem River, for the use of their rail road.

There remains another, though very inferior ground of relief set up in the bill, which is reposed on the alleged misuser of the bridge by the defendants, by permitting, or by their negligence suffering, persons who had no right, to pass over the bridge, and thereby evade the payment of the tolls to which the complainants were entitled.

I do not think that there can be any account, in connection with this injury alone. There is no pretence that the defendants have received any money from persons who have evaded the toll bridge. They have no right to receive compensation for crossing the rail road bridge, and they have not claimed any such right.

The injury to the complainants, is one in the nature of damages. The remedy provided by the second section of the act of 1790, gives a penalty which a court of equity will not enforce; and they can have no redress here, except as incidental to some other relief which this court has jurisdiction to grant. Still if it shall appear that they are entitled to an injunction on this branch of their case, it will then be proper to direct an account of what they might have received in tolls, but for the acts or omissions of the defendants.

As to the remedy by injunction, I am satisfied that the unauthorized use of the rail road bridge alleged in the bill, constitutes such a nuisance to the complainants in the enjoyment of their franchise, that they are entitled to an injunction to restrain it in future.

The rightful use of the bridge, is restricted by law to the purposes of the rail road, and the private use of the inhabitants of Morrisania. The act of 1837 permitting its erection, provided that it should be used in conformity with the right reserved to those inhabitants in the act of 1790, granting the complainants bridge, *and not otherwise*. Thus there was attached to the private bridge, the reasonable condition, that those erecting and

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maintaining it should so keep and use it, that it should not interfere with the rights and privileges vested in the owners of the toll bridge.

If it be made to appear that the owners of the Morrisania bridge, have failed so to keep and preserve the same from being used by persons not authorized to use it; the difficulties in the way of ascertaining and proving every case, or even a considerable portion of the instances, of such improper use of the bridge and the great facility for evading the complainants bridge, and the excessive injury to their franchise which such carelessness of the owners of the other bridge may occasion; furnish abundant grounds for this court to restrain the owners by injunction. The complainants right being undisputed, the case falls within the ordinary jurisdiction of the court against nuisances.

I have looked into the testimony relating to the use of the rail road bridge by persons not authorized, and am satisfied that the rail road company have not exercised that diligence to prevent such persons crossing their bridge, which they were bound to do in reference to the complainants franchise. By their purchase of a bridge already built, adapted to the ordinary travel of the country, they became liable to this duty, which before was incumbent on those who erected it. If they had built a bridge for the use of their rail road only, it would have had no floor or proper conveniences for ordinary travel, and they would not have been subjected to this burthen.

There is nothing in the case however, to implicate the Morris's in this disregard of the complainants rights. Their erection of the bridge, and their sale of it was lawful; and in the conveyance to the rail road company, they stipulated for no other or further use of the bridge for ordinary travel, than they were entitled to while they owned it.

And the testimony does not prove that during the time they owned and controlled the bridge, there was any use made of it to the complainants detriment, or that they were negligent in preventing unauthorized persons from travelling over it.

The complainants having failed to establish any ground of relief against the Messrs. Morris's, the bill as to them must be dismissed with costs.

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As to the Harlem Rail Road Company, the complainants appear to be entitled to an injunction, restraining the company during the residue of the term of the complainants franchise, from permitting or suffering the bridge in question to be used for the passage of any vehicles, foot passengers or animals, for the passage of which over their bridge the complainants are authorized to demand toll ; or for any purpose, save the use of the company's rail road, and the private use of the inhabitants of Morrisania.

The details of the injunction will be adjusted on settling the decree ; and the complainants may have liberty to apply on the foot of the decree, for future relief in case the injunction be violated.

I will also dispose of the question of costs between these parties, to this time, by directing that neither party shall recover costs against the other. The complainants have shown a case for relief, though they have failed in the principal object of their suit.

They are entitled also to a reference, to ascertain what tolls they have lost since the rail road bridge was conveyed to the company, in consequence of the neglect or omission of the company to prevent its use by persons who were not authorized to make use of it without paying toll to the complainants. But I doubt whether this right to a reference, will pay the expense of its prosecution ; and I will direct that if the complainants take a reference and fail to make out a demand exceeding \$100, they shall pay the rail road company's costs of the reference and proceedings thereon. If they make out more than \$100, the company will be decreed to pay the amount to them, with the costs, subsequent to the entry of the decree.



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AGREEMENT.

1. Where M. owning lands subject to a mortgage which he had assumed to pay, sold them to T. who assumed to pay the mortgage, and afterwards on his neglect M. was compelled to pay it, and thereupon sought to foreclose the mortgage for his indemnity; *Held*, that M.'s right to foreclose was perfect without an assignment of the bond and mortgage; and an agreement by M. to forbear collection on receiving such assign-

ment, was without consideration and invalid. *McLean v. Towle*, 117

2. W. being indebted to E. and desiring forbearance, procured N. to advance his securities to E. for the amount, and W. gave to N. his bond for the same sum and transferred divers effects to N. The bond recited the transfer of the latter, and stated it as being to secure the bond. With the bond, the transfer and the effects, W. delivered to N. a letter, giving a history of the transaction, and stating that the effects were transferred to be held in trust for the payment of N.'s securities to E. The letter was accepted without objection, and it conformed to the verbal arrangement.

Held, 1. That the transfer by W. to N., the bond, and W.'s letter, were to be construed together, as if their terms had been brought into one instrument, executed by the parties.

2. That the letter does not conflict with or detract from the bond, or diminish its force; although both derogate from the absolute terms of the transfer executed to N.

3. That the letter is admissible to prove a consideration for W.'s transfer, other than that mentioned in the bond.

4. That it was competent for W. to file a bill against N. and E., to secure from loss, the property assigned to N., and for an account. *Shaw v. Leavitt*, 163

3. Commissioners in partition, who at the same time were admeasuring dower in the same lands under an order of the surrogate, in dividing the lands between three tenants in common, after assigning dower to the widow, allotted the residue to the owners in such manner that two of them took their shares free from dower; the commissioners intending to set off to the third, an infant, the lands subject to dower, with a small parcel besides; and that arrangement was agreed to by one of the owners who was an adult, and by the guardians *ad litem*, of the two other owners who were infants. By their report of the partition, the commissioners omitted to mention the dower lands, or to allot them to the party intended, but allotted to him

merely the small parcel which was free from dower; and the report was confirmed, a judgment entered thereon, and the error was not discovered till nearly thirty years afterwards, the widow having survived all the intervening period. The dower lands added to the small parcel made that share equal with each of the other shares allotted in the partition.

Held, that the agreement between the adult and the guardians, was invalid, and that the occupation by the two who received their full shares, and the sale of such shares, were not a ratification of such agreement, or an acquiescence in the third owner's right to the dower lands. *Douglass v. Viele*, 439

4. Where a debtor, owing a mortgage debt payable in small annual instalments at a future period, on the application of his creditor, advanced to the latter fourteen hundred dollars, on an agreement that he would apply and indorse two thousand one hundred dollars as a payment on the mortgage, and the creditor receipted that sum as such payment:

Held, 1. That there was no loan nor any forbearance, directly or indirectly, by the debtor to the creditor, and that the agreement was not usurious.

2. That the agreement was supported by a valid and sufficient consideration, and was not unconscionable. *Righter v. Stall*, 606

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ATTORNEY.

1. Where there is a *dispute*, and one of the parties consults an attorney, solicitor or counsellor on the subject; the communications between such party and his legal adviser are sacred, and the courts will not permit them to be divulged without the client's consent. *March v. Ludlum*, 35
2. There is a *dispute*, when there are conflicting rights in existence, or claims made, to the same property; which, unless abandoned by one party or the other, or arranged amicably, will terminate in litigation. *id.*
3. The privilege is not affected by the circumstance that the client offered no compensation, and the legal adviser did not make or expect to make any charge for his opinion. *id.*
4. It is highly important to the prevention of litigation, and indispensable to the administration of justice after it ensues, that the privilege of free and unreserved communication by parties with their legal advisers, should be preserved inviolate. *id.*
5. A solicitor for a non-resident complainant, in whose behalf security for costs has been filed, by a surety who justified *ex parte*, is a competent witness presumptively, although he testifies before the time for excepting to the surety has expired. *Van Wezel v. Wyckoff*, 428, 528

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BANKING ASSOCIATIONS.

1. The act to authorize the business of banking, passed in 1838, enabled any number of persons to associate and establish banks of discount, deposit and circulation, on the terms therein prescribed. The capital was not to be less than \$100,000. The associates were to seal and file a certificate, specifying among other things, the amount of the capital stock, and the number of shares into which it was divided, and the names residence and number of shares held by the associates respectively. The shareholders, unless by express stipulation in their articles, were not to be individually liable for the debts of the association.

A banking company was organized under this law, by articles of association, which declared that the capital stock should be a million of dollars, divided into ten thousand shares of \$100 each, but business might be commenced, as soon as \$100,000 were subscribed for and paid. If any shareholder should omit to pay any instalment on his shares, pursuant to any call of the directors, the articles provided that his shares should be forfeited to the use of the association, together with all previous payments made thereon. And the shareholders were not to be personally liable for the debts of the association. The original associates, of whom D. was one, signed four thousand eight hundred and thirty-five shares, on which over \$100,000 was paid in, and the bank commenced business. All the associates signed a paper attached to the certificate or articles of association, by which they subscribed for and agreed to take the number of shares set opposite their respective names, as shareholders in the bank, and mutually bound themselves to fulfil all

the engagements contained in the articles. D. subscribed for twenty-five shares.

Held, 1. That he was liable to pay the whole amount of the stock which he subscribed; 2. That the authority to forfeit the stock for the non-payment of called instalments, was a cumulative remedy, and did not affect the direct liability by force of the subscription. *Sagony v. Dubois*, 466

2. The statute and his subscription, imposed upon him the duty of paying for his stock, which is recognized by the language of the articles of association, and from which the law implies an undertaking to make such payment. *id.*

3. The general banking law intended to provide for the payment, (or securing to be paid,) of an actual, substantial capital, to the extent defined in the articles of association, as the foundation of the operations of the banks thereby authorized. *id.*

4. This was the declared policy of the act, and it was imperatively demanded for the public security, in respect of the important privileges and franchises conferred on those associations. *id.*

See CORPORATIONS, 12, 13.

BANKRUPT.

1. An assignment for the benefit of creditors, giving preferences, made in June, 1842, by one hopelessly insolvent, against whom there were judgments and executions, and who in five months became an applicant for the benefit of the Bankrupt Act of 1841; *held*, to have been made in contemplation of bankruptcy, within the meaning of that act, and therefore void. *Freeman v. Deming*, 327

2. Where, on a bill filed by the assignee under such a void assignment, the general assignee in bankruptcy being a defendant, claimed and was held entitled to the fund, and the other defendants had

not raised any objection to the voluntary assignee's title; the suit was allowed to proceed for the benefit of the assignee in bankruptcy; he being put to his election to adopt the suit, or abandon his claim. *id.*

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1. The giving of negotiable promissory notes for the price, is not of itself such a payment, as will constitute one a bona fide purchaser in equity. *Freeman v. Deming*, 327

2. But if such notes have been negotiated, and when due are apparently, and so far as the makers have reason to believe, really, in the hands of a holder in good faith, for value, in the usual course of trade; the makers are warranted in paying the same, although they then have been informed of the equity of the party claiming the thing sold to them; and they may rely upon the giving of the notes and such payment, as constituting them bona fide purchasers. *id.*

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BOUNDARIES.

Where commissioners appointed by a statute to survey and divide a tract of land, run out and marked the boundary of one of the divisions on the land itself, at a distance of ten chains from the place where they laid it down and described it as being situated on their map and field notes; the division is limited to the line actually marked by the commissioners, and cannot be extended to the line in-

tended as shown by the map. *Voorhees*
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CORPORATIONS.

1. Corporations, in this country, owe their existence to the legislative power; they are created for specific and defined objects and purposes; and they derive all their powers from their charters. To ascertain their capacity, reference must be had to their acts of incorporation. It cannot be inferred, from the mere fact that they are created bodies politic and corporate. *Bard v. Chamberlain*, 31
2. Under a statement in the bill, that by an act of the legislature of another state, a corporation was created with various powers and duties; the complainant cannot prove that the charter of such corporation, conferred on it the power to loan money on real estate and to take bonds and mortgages. *id.*
3. A corporation which has discontinued its business pursuant to its charter, cannot resume it without the sanction of the legislature. *Green v. Seymour*, 285
4. A statute relating to a corporation, which required an acceptance of the act to be filed, or else to be void, was never accepted.—*Held*, that the corporation could not derive any advantage from the passage of the act. At most, the act during the time for accepting it, could only be deemed a recognition of the lawful existence of the corporation as it was previously. *id.*
5. A corporation cannot enforce a mortgage which it has obtained by a transfer, taken contrary to the express provision of its charter. *id.*
6. The mortgagor may avail himself of such illegality, and thereby show that the corporation has no valid title to the mortgage. *id.*
7. The charter of an insurance company provided, that if on any anniversary day of electing its directors, stockholders owning two-thirds of the whole amount of the stock subscribed, should vote to discontinue its business; the directors should cease forthwith from doing any new business, or operations of any kind, except to accelerate closing its concerns; and they were to wind up its affairs as soon as might be. After transacting business three years, at the annual election of directors, more than two-thirds of the outstanding stock voted to discontinue the business of the company. The company then owned about a third of its stock, on which there was no vote. The directors proceeded to close its affairs, and had completed the work, except in respect of a few doubtful debts, and some unsaleable real estate; when six years after the vote, the company commenced the business of discounting notes and circulating its checks, in the similitude of bank notes. In this business, the corporation became the holder of sundry promissory notes, and a mortgage was subsequently assigned to it by the maker, as collateral security. In a suit, by the receivers of the company, to foreclose the mortgage, *held*—
 1. That the vote was a sufficient compliance with the charter, to work a discontinuance of the business of the company.
 2. No previous notice of the intention to take a vote on the question was necessary.
 3. The stock owned by the corporation was properly excluded, in computing the vote of two-thirds of the stock subscribed.
 4. That the resumption of business by the corporation was unlawful; although its corporate existence continued for the purpose of closing its old affairs. And
 5. That the mortgage could not be enforced in its behalf. *id.*
8. A corporation was created by a statute, with power to make life and fire insurances, grant annuities, and to make loans and invest its capital on bonds and mortgages; and the last section declared that the act should expire at the end of fifteen years, except as to insurances on lives, and the granting of annuities. By a subsequent statute, passed at the same session, the corporation was authorized to receive property of all kinds in trust, and to execute trusts in the same manner and to the same extent, as any trustees could lawfully do; and the corporation was directed to convert trust

- property and invest the same in stocks, or in bonds and mortgages. It also provided for a large increase of the capital stock of the company. A statute passed fourteen years afterwards, classified the directors, and limited the amount of its trusts to five millions of dollars. Neither of the acts subsequent to the first, contained any limitation as to time.—*Held*, that the charter was perpetual. That the limitation to fifteen years, did not apply to the life insurance, annuity, or trust powers, conferred on the company. And that it had the power to loan money on bond and mortgage, after the fifteen years expired. *The Farmers Loan and Trust Company v. Perry*, 339
9. In respect of either of the three principal purposes for which the corporation existed, it was authorized to loan money on bond and mortgage. *id.*
10. It is not incumbent on a corporation enforcing a bond and mortgage, to show that it arose from some of its lawful pursuits. *id.*
11. The charter of a corporation prohibited its taking mortgages payable in a shorter time than one year, and the interest to be payable annually. On making a loan in July, the mortgage bore date eighteen days before the money was advanced, and by its terms was payable in one year from date, with interest to be paid yearly, on the first day of November in each year.—*Held*, that the mortgage was valid. The money could not be collected in less than a year from the date of the loan, that being the delivery and so the date of the mortgage. *Held* also, that the statute regulating the time of payment, is to be deemed a part of the contract. *Held* also, as to the interest, that the words "first day of November," should be rejected as surplusage, so as to give effect to the word "yearly," and thus render the mortgage operative. *id.*
12. The terms "subscribe for" and "agree to take," in instruments of subscription for shares in a bank or corporation, considered. *Sagory v. Dubois*, 466
13. A banking association made several calls upon its stockholders for payment on their shares. It declared dividends on the stock paid in, and applied the same to meet some of such calls, the last of which dividends was unauthorized by the situation of the company, and was contrary to the general banking law. After the calls on the shares amounted to half their nominal amount, the directors resolved that no further calls should ever be made, and forthwith discontinued the business of the company, which soon after became insolvent; and on the application of a creditor, the court of chancery appointed a receiver of its property and effects. On a bill filed by the receiver, to compel a stockholder to pay the balance of the nominal amount of his shares;
Held, 1. That the defendant, having become liable by his subscription to pay up his shares in full, as called for by the directors, might be compelled to pay the same by the receiver who represents the creditors of the company, although there was no resolution of the directors requiring such payment.
2. The resolution that no further calls should be made, was void as to the receiver.
3. The unauthorized dividend was not a valid payment upon the defendant's shares, and the amount of the same still remained due and payable.
4. The receiver was authorized to proceed in equity, to compel the payment of the balance due on the shares.
5. The other shareholders were not necessary parties to the suit.
6. The defendant cannot in such suit, question the regularity or propriety of the receiver's appointment.
7. The receiver is entitled to recover interest, from the date fixed by him in his advertisement, for the payment of demands due to the company. *id.*
14. The proprietors of a toll bridge authorized by law, several years after the bridge was built, were incorporated by the legislature. There was no distinct evidence that they accepted the charter, there was proof of some of their own proceedings declining it; and in a *quo warranto* against them by the attorney

general, for assuming to act as a body politic, they had traversed the allegation, and that officer had thereupon entered a judgment of preclusion.—*Held*, that these facts proved that they had not accepted the charter, and were conclusive on the point that they did not thereby become a body politic or corporate. *Thompson v. The N. Y. and Harlem R. R. Co.*, 625

15. A rail road company was chartered with power to build a bridge for their railway across a river. At or near the place where it was to cross, a private bridge had been erected by individuals duly authorized by law, to build a bridge for their own private use, which was entirely convenient, and of sufficient strength for the purpose of the rail road; and the company purchased the bridge of the owners, reserving to the latter the use of it as before.—*Held*, that the owners were authorized to sell, and the company to buy the bridge. *id.*

16. A corporation authorized by law to build a bridge at a given point, may buy one already built at the same point, if suitable for their purpose. *id.*

See BANKING ASSOCIATIONS.

FRANCHISE.

LANDLORD AND TENANT, 3, 4.

COSTS.

1. Costs not given to either party, where the complainants succeeded in a part of their claims, and failed as to the residue. *Ten Eyck v. Holmes*, 428
2. And costs are given to neither party, where both have claimed too much. *Righter v. Stall*, 608
3. Complainants succeeding in a foreclosure suit, excluded from recovering costs unnecessarily incurred. *Green v. Storm*, 305
4. Where the granting of costs is discretionary, the court on giving them to a party, may direct them to be set off upon a judgment held against him and an-

other by the adverse party, although such joint judgment be not the subject of a legal set-off. *Wheeler v. Heermans*, 597

See DOWER, 4.
PLEADING, 6.
WASTE, 1.

COUNSELLOR.

See ATTORNEY.

CREDITOR'S SUITS.

See DEBTOR AND CREDITOR.

CROSS BILL.

See PLEADING, 2, 6.

CUSTOM.

See TENANT FOR LIFE.

D

DEBTOR AND CREDITOR.

- I. *Of assignments, fraudulent as against creditors.*
- II. *Of suits by judgment creditors.*
- III. *Of claims against the separate estate of married women; against heirs and devisees; and for priority of payment.*

DEBTOR AND CREDITOR, I.

Of assignments fraudulent as against creditors.

1. A merchant who was sued for his debts and was insolvent, sold his entire stock in trade to his confidential clerk, on a credit of from three to eighteen months. It was a part of the arrangement that the clerk should continue the business with the merchant's sister, who was to be allowed to draw out of the concern, an annual sum, and was to pay the same

to the merchant, for his assistance in the business. *Held*, that the sale was fraudulent and void as against creditors. *Cooke v. Smith*, 333

2. The vendor assigned the notes which he received on the fraudulent sale, to an assignee, for the benefit of himself and other preferred creditors of the assignor. *Held*, that the assignee was not such a *bona fide* purchaser as to be protected in the notes or their proceeds.

Held also, that the acceptance of such an assignment, was not an affirmation of the fraudulent sale on the part of creditors, so as to prevent other creditors from impeaching it for fraud. *id.*

3. An assignment for the benefit of creditors, giving preferences, made in June, 1842, by one hopelessly insolvent, against whom there were judgments and executions, and who in five months became an applicant for the benefit of the Bankrupt Act of 1841; *Held*, to have been made in *contemplation of bankruptcy*, within the meaning of that act, and therefore void. *Freeman v. Deming*, 327

See EXECUTORS AND ADMINISTRATORS, 2.

DEBTOR AND CREDITOR, II.

Of suits by judgment creditors.

4. In a judgment creditor's suit, to reach things in action, on the return of an execution unsatisfied, if the judgment were recovered in the court of common pleas, the bill must allege, either that the debtor at the time the execution issued, resided in the county in which the judgment was recovered; or that the judgment had been docketed and an execution issued in some other county where the defendant was residing; or it must be shown that for some other cause, the remedy at law was exhausted by the issuing of the execution in the county where the judgment was recovered. *Wheeler v. Heermans*, 597

5. An allegation in such a bill, that the de-

fendant *resides* in a place, has reference to the time of filing the bill, and not to the time of issuing execution. *id.*

6. In a judgment creditor's suit, the following objections were held to be untenable, viz. :

1. That the direction in the execution at law to levy on the real estate of the debtor, stated the day from which his lands were liable, six days short of the actual liability.

2. That the execution was issued within less than thirty days after the recovery of the judgment.

3. That the sheriff's return on the execution, bore date prior to the return day; it not being shown that he parted with the writ till after the return day. *Green v. Burnham*, 110

7. A receiver in a judgment creditor's suit, is entitled to the debtor's things in action, in preference to one who purchased the same with notice of the suit after the bill was filed, and efforts made to serve the subpoena to answer. This was held, although there had been only slight diligence used to effect the service; there being no collusion or concealment. *Weed v. Smull*, 273

8. The title of a receiver thus acquired, is a valid bar to a suit in equity by the purchaser of such things in action, against the party indebted to the judgment debtor. *id.*

9. A creditor at the time of a fraudulent sale, who subsequently recovers a judgment, may on the return of his execution unsatisfied, file a bill to set aside the sale; and may follow the proceeds of the property sold, into the hands of any number of intermediate assignees, and it is not beyond his reach, until it lodges in the hands of a creditor in good faith, who has received and applied it upon his debt, or of a *bona fide* purchaser without notice of the fraud. *Cooke v. Smith*, 334

See DEED, 3, 4.

EXECUTORS, &c., 5, 6.

JUDGMENT AND EXECUTION, 3.

DEBTOR AND CREDITOR, III.

Of claims against the separate estate of married women ; against heirs and devisees ; and for priority of payment.

10. A valid conveyance of real estate in trust for the separate use of a married woman, creates an inalienable interest which cannot be subjected to the payment of liabilities in the nature of debts incurred by her. *Rogers v. Ludlow*, 104

11. If the conveyance were deemed to create a valid power in trust, instead of an express trust, such liabilities would not be enforced against the wife's interest, under the provision of the revised statutes for compelling the execution of powers in favor of the creditors of the beneficiary. *id.*

12. A married woman cannot incur a debt ; and where she has a separate estate, her obligation incurred on the faith of such estate or for its benefit, is enforced, (when capable of being enforced,) as a charge, and never as a personal liability. *id.*

13. A creditor of the ancestor, who is entitled to maintain a suit against heirs in respect of the real estate descended to them, may have a decree against the proceeds of such real estate where the same have been paid into court upon a sale of the property under an order or decree of the court. *Van Wezel v. Wyc-koff*, 428, 528.

14. A subsequent suit against the heirs, in behalf of all creditors, will not affect a suit already instituted by a creditor in his own behalf, unless an order of the court be obtained directing him to come in under the former proceeding. *id.*

See EXECUTORS, &c., 3 to 6, 8.

JUDGMENT AND EXECUTION, 1, 2.

LIMITATIONS OF ACTIONS, 1.

PRINCIPAL AND SURETY, 6 to 8.

DECREE.

See PRACTICE, 7 to 12.

DEED.

1. A conveyance of land, or contract for its sale, is to be construed by its distinct and visible boundaries and monuments as marked or appearing on the land, in preference to quantity, map, or a reference to a previous deed. *Alerton v. Johnson*, 72
2. Thus, where an agreement for the sale of land and its conveyance at a future day, described it as forty acres on the east end of lot four, being all the land deeded to the vendor by P. S., and bounded by a river on the east, P.'s land on the west, by the old P. farm on the north, and by the vendee's land on the south ; and it turned out that there were fifty-four acres within the boundaries last mentioned ; it was *held*, that the vendee was entitled to all the land within those bounds, although the deed from P. S. contained only forty acres. *id.*
3. Pending a suit to redeem, from a mortgagee in possession, lands which he claimed absolutely, the mortgagor made an assignment of the subject matter for the benefit of creditors.—*Held*, 1. That the assignment transferred all the mortgagor's estate and interest. 2. That it was not within the provision of the revised statutes against champerty. *Borst v. Boyd*, 501
4. The mortgagor's assignment conveyed all his real estate and things in action, in trust, to sell and dispose of the same and to apply the proceeds for the benefit of creditors.—*Held*, that the assignees took the estate and property, and not a mere power in trust ; and that the words " real estate," were sufficient to pass the equity of redemption. *id.*

See BOUNDARIES.

MORTGAGE, 55 to 57.

TRUST, 9, 10.

DEPOSITION.

See EVIDENCE.

DESCENT.

On the death of a son without issue, leaving no mother, brother or sister, his real and personal estate, though it came *ex parte materna*, goes to his father in fee and absolutely. *Beeckman v. Schemerhorn*, 181

See HOTCHPOT.

DEVISE.

See WILL.

DOWER.

1. One purchasing the shares of some of the tenants in common of land, pending a suit in equity for its partition, becomes seised of such shares; and if he die, and the decree in the suit direct the land to be sold, his widow will be entitled to her dower in the proceeds arising from his shares. *Church v. Church*, 434
2. On such a purchase, and a subsequent sale under the decree in the suit, the inchoate right of dower of the purchaser's wife, and all liens affecting his share, become impressed upon the proceeds of the sale. *id.*
3. A purchaser under a decree of the court, whose purchase has been confirmed, and who has paid a part of the price, becomes equitably seised *pro tanto*, and his wife acquires in equity, an inchoate right of dower in the land, subject to the payment of the residue of the purchase money. *id.*
4. As between the widow and creditors of the decedent, she is not subjected to any portion of the costs of administering a fund in which she has a dower right. *id.*

See MORTGAGE, 48, 49.

E

ELECTION.

See BANKRUPT, 2.
EXECUTORS, &c. 4 to 7.

EQUITABLE CONVERSION.

See INFANT, 2 to 6.
WILL, 26, 27.

EQUITABLE DOWER.

See DOWER.

EQUITY.

See AGREEMENT, 2.
JUDGMENT, &c., 1, 2.
LANDLORD AND TENANT 1, 2.
MORTGAGE, 27 to 32, 60, 61.

EQUITY OF REDEMPTION.

See MORTGAGE, 16, 53 to 57.

ESTATE.

See DOWER, 1.
MORTGAGE, 16.
TRUSTS, 1 to 3, 7 to 10.

ESTOPPEL.

See RES ADJUDICATA, 1, 2.

EVIDENCE.

1. A husband cannot be a witness in favor of his wife, or of her trustee, in a suit respecting her separate estate; although he has no interest in the subject matter. *Burrell v. Bull*, 15

2. This was held on the ground that public policy prohibits husband and wife from being witnesses for or against each other in civil cases, and from testifying during or subsequent to the marriage, concerning what transpired between them while the marriage subsisted, or came to their knowledge by reason of the married relation. *id*

3. A charge in a will was, to pay "my bond for \$1500, given to H. O. for money loaned for my son's use." There was no such bond, but the testator had delivered to H. O. a bond payable to M. S. for \$1500, for the purpose described; H. O. having made the loan for M. S., and received the interest as agent.—*Held*, that the bond to M. S. was intended, and was a valid charge under the devise; and that the evidence was competent to show the misdescription. *Smith's Executors v. Wyckoff*, 77

4. A creditor provided for in an assignment, is not a competent witness for the assignee, in a suit to avoid a transfer of property made by the assignor. *Jacks v. Nichols*, 313

5. The deposition of a witness, taken down by the proper officer after he was sworn, but which he refused to sign, was allowed to be read in evidence. *Clarke v. Sawyer*, 352

6. Facts, which are a part of the experience and common knowledge of the day, are legitimate grounds for the judgment of the court. This principle applied to the usual duration of voyages across the Atlantic, by steam and other packet ships. *Oppenheim v. Leo Wolf*, 571

7. Application was made to D. for a loan to be obtained from his father-in-law H; D. negotiated the loan for \$2600, and on taking the mortgage, gave his notes for \$600, of the amount; but the loan was all advanced by H., to whom the mortgage was given. D. took a mortgage to himself for \$300, for his trouble in doing the business. In a suit by H.

to foreclose his mortgage; *Held*, that D. was a competent witness for H.—*Hetfield v. Newton*, 564

See AGREEMENT, 2.

ATTORNEY.

CORPORATIONS, 2, 11.

LANDLORD AND TENANT, 2.

MORTGAGE, 53, 54.

PLEADING, 1, 4, 12, 13.

PROMISSORY NOTES, 8 to 10.

PRACTICE, 1 to 3.

USURY, 20, 22, 23.

EXCHANGE.

See USURY, 1 to 5.

EXECUTED AGREEMENT.

See MORTGAGE, 38 to 40.

EXECUTION.

See JUDGMENTS AND EXECUTIONS.

EXECUTORS AND ADMINISTRATORS.

1. Letters testamentary were granted here, to the executrix named in the will of a testator whose domicil was here, but who died during a temporary residence at Carthagea in South America. H., who had consigned goods to him at that place, proceeded thither and obtained from the United States Consul, such property as by the marks, he was satisfied belonged to the consignor. H. thereupon, suppressing the fact of the existence of a will in New York, obtained a grant of administration to himself, from the court at Carthagea, and under that grant, possessed himself of the testator's effects in that country. In a suit by the executrix against H., *Held*, 1. That H. was not accountable for the goods delivered to him by the Consul, there being no reasonable doubt but that they were his own.
2. That the administration at Carthagea,

- was entirely ancillary and subordinate to that instituted in New York; and that the foreign administrator, on being served with process here, must account to the primary legal representative, for the assets which he has received abroad.
3. That this court will not interfere with the course of administration which the foreign tribunal has directed, or which the laws there prescribe; and the accounting here, will be limited to the assets remaining after the payment of expenses, and of debts in the foreign state, discharged in due course. *Ordronaux v. Helie*, 512
2. An executrix cannot set aside transfers of property, made by her testator, without consideration, for the purpose of defrauding creditors. *id.*
3. In settling a debt due to an intestate, from one of his children and next of kin who is insolvent, the intestate having left a widow and nine children, there must be credited to such child, one-ninth of two-thirds of the personal estate; his debt being included as a part of the assets. If the debt exceed his distributive share, it will be deemed assets to the extent of such share. *Howland v. Heckscher*, 519
4. Where the widow of the intestate died before the distribution, and such insolvent child became entitled to share in her estate, as one of her legatees and next of kin; it was *held*, that the legal representatives of the intestate father, could not withhold from the widow's administrator, any part of her third of the personal property of the intestate, in order to apply it to the debt due to the latter from the insolvent next of kin. *id.*
5. Though the widow of an intestate may accept her third of the personal estate in stocks, securities or movables; she has no right or title to a third of any specific chattel or thing in action; and she cannot be compelled to receive either one or the other, or any thing but money. *id.*
6. She is in no sense, (prior to such a distinct acceptance,) a creditor of persons who stand as debtors to the intestate. *id.*
7. The principal trusts of the will of a decedent, having been declared void by a vice-chancellor, some years after his death; the payments made under it being sanctioned by the decree, and the widow being directed to elect between her dower and certain valid provisions made for her by the will; appeals were taken from the decree, which protracted the suit; pending the appeals, the executors continued to pay and keep their accounts as before; and the widow neglected to make her election, and died before the decision, which was an affirmation of the decree. In a suit between the executors, and the assignees of one of the next of kin; *Held*, 1. That the latter could not object to payments made under the will, prior to the decree. 2. That the payments according to the will subsequent to the vice-chancellor's decree, were not valid, and must be disallowed. And, 3. That the vice-chancellor, to whom the suit on the will was remitted by the appellate court, had jurisdiction to permit the widow's administrator to make the election granted to her, although the time limited for her election elapsed in her life time. *id.*
8. Where one of the next of kin, being largely indebted to the estate, made an assignment for creditors preferring that debt, and the executors, besides having his distributive share, held a large fund set apart to meet legacies which were not yet payable, and the periods of payment were in part contingent; it was *held*, that the executors after applying to the debt his share of the assets in hand, must also apply the reasonable value of his interest in the surplus of the legacy fund, before enforcing payment of the balance of his debt from the assignees. *id.*

See INTERPLEADER, 3.
JUDGMENT, &c., 1, 2.
TRUSTS, 5, 6, 9, 10.

EXECUTORY DEVISE.

See WILL, 15.

EXTINGUISHMENT.

See MORTGAGE, 42 to 44, 19, 20, 33, 34.

EXTRINSIC EVIDENCE.

See EVIDENCE, 3.

F**FAILURE OF TITLE.**

See MORTGAGE, 6.

FERRY.

See FRANCHISE.

FIDUCIARY.

See LANDLORD AND TENANT, 1 to 7.
PRINCIPAL AND AGENT, 1.
TRUSTS, 7 to 10.

FIRE-BOTE.

See TENANT FOR LIFE.

FORBEARANCE.

See USURY, 7, 8.

FORECLOSURE.

See MORTGAGE, X.

FOREIGN CORPORATION.

See CORPORATIONS, 1, 2.

FRANCHISE.

1. A statute, authorizing an individual to erect a bridge, and to receive tolls for its use, confers upon him a franchise; and a substantial compliance with the conditions imposed by the act, will invest him with its rights and privileges. *Thompson v. The New York and Harlem Rail Road Company*, 625
2. The legislature in 1790, authorized M. to erect a toll bridge across a navigable river or arm of the sea, where the tide flowed, and to maintain the same for sixty years; and the act provided that it should not be lawful for any person or persons to erect or maintain a bridge or ferry, between the two places which were to be connected by M.'s bridge. The toll bridge was built accordingly. In 1832, the legislature authorized the construction of a railway across the same river, between two distant places, which would necessarily cross the river at or near such bridge, and which was constructed and was carried across the river by a bridge, one fourth of a mile distant, from the former; and in its operation the rail-road diminished by one-third, the accustomed receipts of the toll bridge;

Held, 1. That the act conferring the franchise on M., was not a covenant or grant that no similar franchise should be conferred on others; and did not restrict the authority of a future legislature, to establish a toll bridge or ferry at the same place.
2. That the grant to the rail road company did not impair the obligation of any contract with M., within the meaning of the prohibition in the constitution of the United States.
3. That the franchise granted to the rail road company, was not the same as that conferred on M., nor so similar as to be deemed an interference with the latter, in the sense in which a new bridge or ferry interferes with one previously established at the same point.
4. That if it were a direct interference, the rail-road company were authorized to erect and maintain a bridge for the use of their railway, adjacent to M.'s bridge, and

the act granting them the power was valid. *id.*

3. It is the province and the right of the legislature, in the exercise of its sovereign duty, to provide ways for the use of the people, to authorize the construction and use of newly invented or improved modes of conveying passengers and freight; although the necessary consequence may be, that profitable modes of conveyance in actual use, will thereby be superseded, although those engaged in them will be subjected to the loss of their business and capital; and although valuable franchises previously conferred by the legislature in respect of such old modes, will be rendered unavailable and worthless. *id.*

4. There is no implication of an exclusive right to a franchise, where the charter or act conferring it, is silent on the subject. *id.*

5. Where a franchise has become vested in the donee or grantee, it is no defence to a suit brought by him to assert or maintain the franchise, that he has forfeited it by any subsequent acts of commission or omission. *id.*

6. There must be a judicial forfeiture of the franchise, at the suit of the state, before individuals can avail themselves of such acts. It cannot be impeached collaterally. *id.*

7. Where an act conferring a franchise to build a bridge and to take tolls, provided that the owner of any unauthorized bridge or vessel used to transport passengers at the same point, should pay treble tolls, to be recovered by the donee in an action of debt before a justice; in a suit in equity by the owner of the bridge, against a corporation, for a violation of his franchise through a new bridge, alleged to be unauthorized;

Held, 1. That the remedy given by the act was cumulative, and did not preclude the donee from resorting to other actions.

2. If the act were otherwise, the necessity of the case would warrant another remedy, as the corporation could not be sued before a justice.

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3. That chancery has jurisdiction to restrain by injunction, the unlawful use of the new bridge, at the suit of the owner of the franchise.

4. That chancery would not maintain a suit in his behalf for an account of the tolls lost through the use of the new bridge; but if a case were made for its interposition by way of injunction, it would decree an account as an incident to such relief.

5. That this court would not enforce the penalty provided by the act. *id.*

FRAUD.

1. An original bill may be filed to set aside a decree obtained by fraud. *Loomer v. Wheelwright*, 135

2. Where a mortgagee, having two mortgages for the same debt, one on the principal debtor's lands, and one on lands of a surety whose infant heir has succeeded thereto, after the debt was satisfied by a conveyance of the former, filed a bill against the infant to foreclose the mortgage on the lands of the latter in which he claimed the mortgage money to be due, and the infant answered by his guardian ad litem, no defence was set up, the usual decree for a foreclosure and sale was made, and the infant's lands were sold under the decree, the mortgagee becoming the purchaser of a portion of the same; it was held that the decree was obtained by fraud, and it was set aside. Also held, that the mortgagee must release to the infant the lands bought in by him, and account for the rents and profits of the same, and for the sums paid by the purchasers at the sale, who were strangers to the fraud. *id.*

See DEBTOR AND CREDITOR, 1 to 3, 9.
EXECUTORS AND ADMINISTRATORS, 2.
JURISDICTION, 3.
LOAN COMMISSIONERS, 1 to 3.
SALE.

FRAUDS, STATUTE OF.

See LANDLORD AND TENANT, 1, 2.
SPECIFIC PERFORMANCE, 2 to 5.

FREE BANKS.

See BANKING ASSOCIATIONS.

G

GENERAL BANKING, LAW.

See BANKING ASSOCIATIONS.

H

HEIRS.

See DEBTOR AND CREDITOR, 13, 14.
LIMITATIONS.
TRUSTS.

HOTCH-POT.

1. The provision in the statute regulating descents, for bringing advancements made by an intestate, into *hotch-pot*, in the division of his real estate, does not apply where there is a will disposing of a part of the decedent's property, either real or personal. It relates to a total intestacy only. *Thompson v. Carmichael*, 120
2. Where a will, disposing of all the decedent's real and personal property, was decreed to be invalid, except as to some specific legacies, and a charge for the support of his widow; it was *held*, on a partition of the real estate, that an heir who had received an advancement from the decedent, was not bound to bring the same into *hotch-pot*, or account for it in the division of the estate. *id.*
3. The same doctrine has always prevailed in England, under the statute 22 and 23 Charles 2, ch. 10, from which our law was taken. *id.*

HUSBAND AND WIFE.

See EVIDENCE, 1, 2.

INFANT, 3 to 5.

LIMITATION OF ACTIONS, 2.

MARRIAGE SETTLEMENT, 1 to 6.

PRINCIPAL AND SURETY, 1 to 5.

WILL, 18.

I

ILLEGAL ACT.

See CORPORATIONS, 4 to 7.

IMPROVEMENTS.

See PARTITION, 1.

INFANT.

1. An infant purchased goods and executed a mortgage thereon for the purchase money.—*Held*, after he became of full age, that he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount or deliver the goods, according to its tenor. If he disaffirmed the mortgage, he must restore the goods, or account for their value. He cannot affirm the sale and keep the goods, and at the same time repudiate the mortgage. *Ottman v. Moak*, 431
2. Where the court of chancery, under the statute authorizing the sale of infant's lands, directed the sale of a farm, in which four infants as tenants in common had a fee determinable as to each on his death without issue, and in which there was a devise over to the survivors upon such contingency; it will be deemed that the court intended that the purchaser should acquire the whole title, and on any of the proceeds coming within the control of the court, it will require the infants on becoming of age, to convey to the purchasers, as a condition of their receiving such proceeds. *Davison v. De Freest*, 456
3. The conversion of lands of infants into

personalty, by means of a sale under the statute, does not alter the character of the property, in respect of those who had interests in the land which might be affected by such an alteration. *id.*

4. Thus, where all the infants shares were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold; it was held that on the death of one, by which the devise over in her share would have taken effect, if the land had not been converted, her share of the proceeds must be paid to the executory devisees, and that neither her husband nor her administrator had any right to such share. *id.*

5. The interest which accrued on the proceeds in her life time, belongs to her administrator. *id.*

6. The orders of the court, made on the sale of infants lands under the statute, and distributing the proceeds, though conclusive between the infants and purchasers, do not conclude the infants as between themselves, as to their respective rights and interests in the fund. *id.*

See FRAUD, 1, 2.
MORTGAGE, 5, 35, 36.

INJUNCTION.

See FRANCHISE, 7.
WASTE, 1.

INOFFICIOUS WILL.

See WILL, 5, 6.

INSTRUCTIONS.

See WILL, 5, 6.

INTEREST.

1. A debtor on a mortgage bearing six per cent. interest, who at the end of each half year for several years, pays seven per cent., taking receipts, each ex-

pressed to be for six month's interest; cannot have the excess beyond six per cent., applied to extinguish the principal. *The N. Y. Life Insurance and Trust Co. v. Manning*, 58

2. Each receipt so accepted by the debtor, is evidence of an agreement to pay seven per cent. interest for the preceding six months; and whether it be deemed antecedent or made at the time of payment, it has the same consideration, the creditor's forbearance; and having been executed, the court will not interfere, even if the agreement were not such as could have been enforced. *id.*

3. Such receipts are not evidence of a continuing agreement to pay the higher rate of interest beyond the period which they cover. *id.*

See CORPORATIONS, 13.
USURY.

INTERPLEADER.

1. It is no objection to a bill of interpleader, that the complainant has an interest in respect of other property not in the suit but which might be litigated, that one party rather than the other should succeed in the interpleader, so as to increase his own chance of success, in respect of such other property. Such interest may be termed an interest in the question, but not in the particular suit, and does not prevent him from filing an interpleader. *Oppenheim v. Leo Wolf*, 571

2. If however the complainant be liable to either party in respect of the specific fund in dispute, beyond the question of property, or make claims on the fund which either of the defendants contests, it is not a proper case for an interpleader. *id.*

3. J. having placed goods in the hands of O., as a security for advances, obtained the goods on a promise of other indemnity, and departed from New York to go to Liverpool, on the 11th of March,

1841, in the steamship *President*. Nothing was ever heard of the ship, or of any person who sailed in her, after she left the harbor of New York. In April, and again in May, 1841, J.'s attorney placed securities in the hands of O. for the promised indemnity, and directed O. to pay the surplus to W., to whom J. was largely indebted; to which O. agreed. In August, 1841, administration was granted on J.'s estate. There being a surplus, it was claimed from O. by W., and by the administrator of J., and each sued O. at law for the same. The administrator did not question O.'s right to the indemnity.

Held, 1. That it was a proper case for a bill of interpleader by O. against the rival claimants; and that he was under no personal obligation to W., which prevented his resorting to that remedy.

2. That J. is presumed to have been lost at sea, before May, 1841; and the powers of his attorney were thereby terminated.

3. That the administrator was entitled to the surplus. *id.*

ISSUE.

See WILL, 12.

J

JUDGMENT CREDITOR'S SUITS.

See DEBTOR AND CREDITOR, II.

JUDGMENT AND EXECUTION.

1. An executor, who was also a devisee and legatee, wasted a large portion of the assets of the testator, being more than double his own proportion of the whole estate, and the other legatees were thereby compelled to pay a debt of the testator which he might and ought to have discharged out of the personal effects. In a suit between such legatees, and a creditor of the executor, whose judgment was a lien upon unsold real estate devised to the ex-

ecutor, it not appearing that the devastavit was committed before the docketing of the judgment; it was *held*, that the legatees could not have priority over the legal lien of the judgment creditor, to enforce their right against the defaulting executor, upon the real estate so devised to him. *Wilkes v. Harper*, 6

2. If it had appeared that the whole devastavit had been accomplished before the lien of the judgment attached, *quere* whether the equity of the legatees should be preferred, against such real estate, to the lien of the judgment creditor?

id.

(*Note*. It would not be preferred; 2 Barb. Ch. R. 338.)

3. It is not necessary to docket a judgment recovered in the supreme court, in order to sell lands on an execution thereon; nor a judgment in the superior court or common pleas, in order to sell on the execution lands situated in the same county. In both cases, judgments must be docketed to create a priority of lien thereby; and in the latter case, in order to affect lands in other counties. *Wheeler v. Heermans*, 597

See DEBTOR AND CREDITOR, 6.

JOINT OWNERS.

See the references under the Title,
TENANT IN COMMON.

JOINT STOCK COMPANIES.

See CORPORATIONS, 12 to 14.
PARTNERSHIP.

JURISDICTION.

1. The court of chancery cannot set aside a public sale, made by an officer who is not acting under the direction of the court, on the ground of the inadequacy of the sum bid by the purchaser, however gross or startling it may appear. *March v. Ludlum*, 35

2. Nor is it a ground for relief against such a sale regularly conducted, that the party chiefly interested in attending upon, or preventing it, was ignorant that it was to take place; even if the property sell for a twentieth part of its value.

id.

3. The jurisdiction of the court of chancery, in a case of fraud, of trust, or of contract, is sustainable, wherever the person sought to be affected is found; although lands not within the jurisdiction of the court, may be affected by the decree. *De Klyn v. Watkins*, 185

4. A bill was filed in this state, against several defendants, of whom one lived in New Jersey, but was served with process here. The principal subject of the suit, was land in New Jersey, owned by that party, but land in New York was also affected; and the ground of the suit, was a fraudulent transfer of the whole, executed here.—*Held*, that the court had jurisdiction to set aside the conveyance, and make a decree against the New Jersey defendant and his lands. *id.*

5. Chancery has jurisdiction in general, to compel the delivery up of securities wrongfully withheld; and it will be exercised, although the case be remediable at law, if no objection to the jurisdiction be taken by demurrer, or in the answer. *Kobbi v. Underhill*, 277

6. Commissioners in partition, who at the same time were admeasuring dower in the same lands under an order of the surrogate, in dividing the lands between three tenants in common, after assigning dower to the widow, allotted the residue to the owners in such manner that two of them took their shares free from dower; the commissioners intending to set off to the third, an infant, the lands subject to dower, with a small parcel besides; and that arrangement was agreed to by one of the owners who was an adult, and by the guardians *ad litem*, of the two other owners who were infants. By their report of the partition, the commissioners omitted to mention the dower lands, or to allot them to the

party intended, but allotted to him merely the small parcel which was free from dower; and the report was confirmed, a judgment entered thereon, and the error was not discovered till nearly thirty years afterwards, the widow having survived all the intervening period. The dower lands added to the small parcel, made that share equal with each of the other shares allotted in the partition.—*Held*, although the agreement was invalid, and there was no sufficient ratification or acquiescence, that on the ground of accident, a court of equity could grant relief, and could give full effect to the defective partition, according to the original design of the commissioners, and the justice of the case. *Douglass v. Viele*, 439

7. Though an administrator's purchase of a part of the intestate's lands, at a sale made by him under a surrogate's order, is voidable in equity; as to other lands of the intestate claimed by the administrator, not conveyed to him by the deed under the surrogate's sale: the heir's remedy is at law, and not in equity. *Ward v. Smith*, 592

See CORPORATIONS, 13.

EXECUTORS AND ADMINISTRATORS, 1, 7.

FRANCHISE, 7.

SPECIFIC PERFORMANCE.

WASTE, 1, 2.

L

LANDLORD AND TENANT.

1. Where two or more parties are interested in a lease about expiring, one of them cannot take a new lease in his own name to the exclusion of the others. And if, after undertaking with the others, to procure a renewal, he take it to himself, and attempt to retain it solely, it is a fraud upon his associates. *Burrell v. Bull*, 15

2. P. conducted a refectory, owning three fourths of the lease, fixtures, stock and movables; and S. owned the other fourth. B. and M. held mortgages on

- P.'s interest, which were deemed not quite secure; arrears of rent were due, and a distress made. B. and M. in the absence of S., agreed with P. to pay the rent in arrear, if he would give them instant possession of the refectory, and that they would protect the interests of S., who was to refund to them one-fourth of the arrears. They received possession of the whole accordingly, and placed an agent in charge. S. on his return assented to what had been done. B. and M. did not pay the arrears, but suffered a sale therefor under the distress, at which they became the purchasers of the fixtures, stock and movables, and continued the business. The lease had nearly expired, and before the sale it had been arranged that B. should procure a new lease for the common benefit of S., B. and M. He obtained the renewal in his own name and claimed it as his own; and soon after, he and M. separately, sold their respective interests in the whole concern, to K. and delivered to him possession of the whole, which he maintained, excluding S. In a suit by S. against B., M. and K. :—*Held*, 1. That B. and M. were bound to account to S. for one-fourth of the profits from the time they took possession, till their sale to K., and for one-fourth of the price obtained for the refectory from him, and were entitled to credit for one-fourth of the rents paid by them upon the distress and subsequently.
2. That the new lease obtained by B., ensured to the benefit of M. and S.
 3. That P. was a competent witness for S., though he was originally to pay the rent as a part of the expenses of the refectory.
 4. That K. was also a competent witness for S., his liability being secondary to that of B. and M., and all being liable, *ex delicto*.
 5. That the statute of frauds has no application, either to the agreement to pay the arrears of rent, or to the interest which S. claimed in the renewed lease. *id.*
 3. A continuance of church leases, is expected as a matter of course, without any covenant of renewal. *Gibbes v. Jenkins*, 130
 4. The good will for such a continuance, arising from the ownership of the old lease, constitutes a recognized and valuable interest, although the corporation granting such lease, is not bound to continue it, or grant a renewal. *id.*
 5. The new lease, in such cases, is held a continuance of the original term, for the protection of the rights of parties who had liens upon or interests in such term. *id.*
 6. One purchasing a leasehold, which is subject to a mortgage, and contains no covenant of renewal, cannot escape the lien of the mortgage, by suffering the lease to expire, and afterwards obtaining a new lease for the premises. *id.*
 7. Such new lease is in equity subject to the mortgage, precisely as the former one was when its term expired. *id.*
 8. A mortgagee, whose debt is all due and is defectively secured, by procuring a receiver, obtains an equitable lien on the unpaid rents of the lands mortgaged. *Lofsky v. Maujer*, 69
 9. Previous to the appointment of a receiver in a foreclosure suit, the owner of the equity of redemption by purchase from the mortgagor, had received from his tenant, a note for the rent accrued and a mortgage on personal property executed by a friend of the tenant for its further security; but no actual payment had been made. *Held*, that there was no merger of the rent, but the landlord's right to distrain continued; and that the receiver was entitled to the unpaid rent, in preference to the owner of the equity of redemption. *id.*

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See JUDGMENT AND EXECUTION, 1, 2, WILL, 16, 18, 20, 21, 22 to 27.

LEGISLATIVE POWER.

See FRANCHISE, 2 to 4.

LEX LOCI.

See JURISDICTION, 3, 4.
USURY, 3, 4, 17, 18.

LIEN.

See JUDGMENT AND EXECUTION, 1 to 3.
LANDLORD AND TENANT, 6 to 9.
MORTGAGE, 25, 26, 42, 43.

LIMITATION OF ACTIONS.

1. The statute of limitations does not run in favor of heirs, during the three years next succeeding the granting of letters testamentary or of administration on the estate of their ancestor. *Van Wezel v. Wyckoff*, 428, 528
2. An administrator, in 1805, became the purchaser of lands of his intestate, at a surrogate's sale, and they were held adversely, from that time onward. W., a daughter of the intestate, was then a married woman, and so continued till 1827. In 1839, she filed a bill to set aside the sale. *Held*, that she was not barred by lapse of time. *Ward v. Smith*, 592

See MORTGAGE, 53 to 56.

LIS PENDENS.

The case of *Leavitt v. Tylee*, 1 Sand. Ch. R. 207, confirmed. *Shaw v. Leavitt*, 163

See DEBTOR AND CREDITOR, 7, 8.
PLEADING, 7 to 9.

LOAN.

See USURY, 1 to 3, 6 to 8.

LOAN COMMISSIONERS.

1. The court of chancery cannot set aside a public sale, made by an officer who is not acting under the direction of the court, on the ground of the inadequacy of the sum bid by the purchaser, however gross or startling it may appear. *March v. Ludlum*, 35
2. Nor is it a ground for relief against such a sale regularly conducted, that the party chiefly interested in attending upon, or preventing it, was ignorant that it was to take place; even if the property sell for a twentieth part of its value. *id.*
3. A judgment creditor purchased the farm of his debtor, at a sale under the judgment. The farm was worth \$3000, and was subject to a mortgage to the loan commissioners for \$131, executed sixteen years before. The debtor ceased to pay the interest thereon after the sale, upon which the farm was advertised by the commissioners and sold and conveyed to L. a neighbor of the debtor, for \$146. The creditor residing in a distant state, was ignorant of the existence of the mortgage until after the sale, as was his attorney who resided in the county. The sale was advertised according to the commissioners usual practice. The notice was published in a newspaper which had the greatest circulation in the part of the county where the farm was situated and was to be sold, and the notices were posted in the same part of the county. The attorney lived in a different section, where there were three newspapers of a much larger circulation. There were but five or six persons present at the sale. L. went with the debtor to the sale, and was urged by the debtor to buy the farm. After arriving, he consented to buy it, and borrowed the money for the purpose at the place of sale. After the sale, he permitted the debtor to occupy the farm, the latter taking a lease. There was no proof that L. bought the farm for the debtor, or that any of the consideration was furnished by the debtor, or that either of them deterred or prevented others from

hearing of or attending the sale. On a bill by the creditor to set aside the sale for fraud and unfairness—*held*, that the sale was regular, and that it could not be set aside on the facts established. Also *held*, that after the sheriff's sale, there was no relation of trust or confidence between the debtor and the creditor, nor any duty on the part of the former, which required him to apprise the latter of the impending sale, or precluded him from buying at the sale. *id.*

LOCATION OF LANDS.

See BOUNDARIES.

DEED, 1, 2.

SPECIFIC PERFORMANCE, 8, 9.

LUNACY.

See WILL, 1 to 12.

M

MAINTENANCE.

See WILL, 18.

MARRIAGE SETTLEMENT.

1. The case of *Ordronaux v. Rey*, (3 Sand. Ch. R. 33,) referred to and confirmed. *Ordronaux v. Helie*, 512

2. A conveyance of real estate, in trust to lease the same and to pay and apply the income unto such persons, for such uses and purposes, and in such parts and manner, as E., a married woman, should in writing appoint; and for want of such direction, then to her proper hands; or otherwise to permit her to receive the income for her sole and separate use and benefit; is valid as an express trust. *Rogers v. Ludlow*, 104

3. Such a trust interest in real estate, cannot be subjected to the payment of liabilities, in the nature of debts, created by the wife. *id.*

4. If the conveyance were deemed to create a valid power in trust, instead of an express trust, such liabilities would not be enforced against the wife's interest, under the provision of the revised statutes for compelling the execution of powers in favor of the creditors of the beneficiary. *id.*

5. A married woman cannot incur a debt; and where she has a separate estate, her obligation incurred on the faith of such estate or for its benefit, is enforced (when capable of being enforced,) as a charge, and never as a personal liability. *id.*

6. The revised statutes relative to Uses and Trusts, do not apply to a marriage settlement of personal property creating no future interests. *Hanley v. Carroll*, 301

See MORTGAGE, 48, 49.

MARSHALLING SECURITIES.

See MORTGAGE, 27 to 30, 34.

MENTAL CAPACITY.

See WILL, 1 to 12.

MERGER.

See LANDLORD AND TENANT, 9.
MORTGAGE, 42 to 44.

MISREPRESENTATION.

See SPECIFIC PERFORMANCE, 7 to 9.

MISTAKE.

See JURISDICTION, 6.
SPECIFIC PERFORMANCE, 7 to 9.

MORTGAGE.

I. *Of its validity and legality; of affirm-*

- ing or disaffirming a mortgage by an infant ; and of defence on the ground of failure of title.*
- II. *Of conveyances intended as a security.*
- III. *Of the recording of mortgages, and its effect on prior incumbrancers ; and of notice.*
- IV. *Of mortgages of terms of years, and their lien upon renewal of the terms.*
- V. *Of the estate of the mortgagor and mortgagee ; effect of purchase subject to a mortgage.*
- VI. *Of subrogation, substitution and surety.*
- VII. *Assignment of mortgages, and the rights consequent thereon.*
- VIII. *Of the payment and satisfaction of mortgages, and application of payments ; Of merger and extinguishment.*
- IX. *Of redemption of mortgaged premises, and proceedings therefor.*
- X. *Foreclosure ; Defence ; Decree.*

MORTGAGE, I.

Of its validity and legality ; of affirming or disaffirming a mortgage by an infant ; and of defence on the ground of failure of title.

1. A defendant who sets up an equitable title to land, against a mortgagee in good faith of the legal estate without actual notice ; in order to affect the latter with constructive notice, by means of his possession at the date of the mortgage, should allege in his answer that he was then in possession, claiming the land as his own. It is not sufficient to allege that the defendant was in possession at, and long before, the execution of the mortgage. *The N. Y. Life Insurance and Trust Co. v. Culler*, 176
2. Such an equitable owner of a farm cannot enforce his right against one who, on the faith of the legal owner's recorded title, purchased another farm of the latter, charging it with a fixed proportion of a mortgage given by such owner on both farms ; the purchaser having no notice of the equity in respect of the former. *id.*
3. A corporation cannot enforce a mort-

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gage which it has obtained by a transfer, taken contrary to the express provision of its charter. *Green v. Seymour*, 285

4. The mortgagor may avail himself of such illegality, and thereby show that the corporation has no valid title to the mortgage. *id.*

See CORPORATIONS, 3 to 7.

5. An infant purchased goods and executed a mortgage thereon for the purchase money.—*Held*, after he became of full age, that he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount or deliver the goods according to its tenor. If he disaffirmed the mortgage, he must restore the goods, or account for their value. He cannot affirm the sale and keep the goods, and at the same time repudiate the mortgage. *Ottman v. Muak*, 431

6. A purchaser under an order for the sale of infants lands, who has never been evicted or disturbed in his possession, cannot resist the foreclosure of his mortgage for the purchase money, on the ground that he did not obtain a good title. *Davison v. De Freest*, 456

See CORPORATIONS, 8 to 11.

MORTGAGE, II.

Of conveyances intended as a security.

7. The owner of two lots, which had been sold on an execution against him, agreed with M. that she should buy one of the lots, and pay the price by redeeming both from the sheriff's sale. M. was to take a deed from the sheriff, pay all liens and charges, and on receiving the surplus, beyond the price of the one lot, with interest, at a day fixed, was to convey the other lot to the vendor ; or if such payment were not made, was to retain both lots. The vendor was by a like covenant, to give possession of the lot sold to M.—*Held*, that by the agreement, M. became the purchaser of the

one lot, and took the other lot as a security for her advances beyond the price of the former; and that she was bound to convey to the vendor, on being refunded, such excess with interest.
Barton v. May, 450

MORTGAGE, III.

Of the recording of mortgages, and its effect on prior incumbrancers; and of notice.

8. Parties acquiring liens or interests subsequent to the recording of a mortgage, must notify the same to the mortgagee, if they wish to influence or control his action in respect of the lands mortgaged.
King v. McVickar, 192

9. The recording of a mortgage is not notice of its existence to a prior mortgagee. *id.*

10. A party setting up a prior legal right in an answer, is not bound to deny notice of a subsequent lien or interest, unless such notice be distinctly alleged against him. The rule is different, where one is resisting a prior title, on the ground that he purchased in good faith, without notice. *id.*

See MORTGAGE, 1, 2.

MORTGAGE, IV.

Of mortgages of terms of years, and their lien upon renewal of the terms.

11. A continuance of church leases, is expected as a matter of course, without any covenant of renewal. *Gibbes v. Jenkins,* 130

12. The good will for such a continuance, arising from the ownership of the old lease, constitutes a recognized and valuable interest, although the corporation granting such lease is not bound to continue it, or grant a renewal. *id.*

13. The new lease, in such cases, is held

a continuance of the original term, for the protection of the rights of parties who had liens upon or interests in such term. *id.*

14. One purchasing a leasehold, which is subject to a mortgage, and contains no covenant of renewal, cannot escape the lien of the mortgage, by suffering the lease to expire, and afterwards obtaining a new lease for the premises. *id.*

15. Such new lease is in equity subject to the mortgage, precisely as the former one was when its term expired. *id.*

MORTGAGE, V.

Of the estate of the mortgagor and mortgagee; Effect of purchase subject to a mortgage.

16. In this state, the equity of redemption is a *legal estate*; and so continues, notwithstanding the lapse of the day of payment, and although the mortgagee may be in possession; until it is cut off by foreclosure or otherwise. *Borst v. Boyd,* 501

17. A creditor taking from his debtor in compromise and satisfaction, a conveyance of land subject to a mortgage thereon, ceases to be a creditor, and becomes a purchaser of such land; and he cannot compel the debtor to pay the mortgage. *Brewer v. Staples,* 579

18. S. having mortgaged his lands to B., subsequently transferred to B., a debt against Q. as a collateral security. Afterwards, S. being largely indebted to T., compromised the debt for less than its amount, and paid it by conveying to T. the same lands, expressly subject to the mortgage to B.—*Held*, that T. had no right to require B. to collect Q.'s debt, and apply it to the satisfaction of the mortgage; that the land was the primary fund; and that S. could require B. to exhaust it before resorting to Q.'s debt, which was collateral to the mortgage. *id.*

See MORTGAGE, 19, 20, 49, 53 to 57.

MORTGAGE, VI.

Of subrogation, substitution, and surety.

19. A surety in a debt secured by mortgage on lands of the principal, on paying off the debt, becomes subrogated in equity to the rights of the creditor, and is entitled to foreclose the mortgage in his own name. *McLean v. Towle*, 117
20. So where one owning lands which he had mortgaged, sold them to M, who assumed the mortgage debt, and M. sold them to T. who assumed the mortgage in like manner, and M. was then compelled by the original debtor, for his indemnity, to pay to the creditor the amount of the mortgage; it was *held*, that M. could foreclose the mortgage against P. and the lands mortgaged. *id.*
21. Where tenants in common unite in executing a joint mortgage, for a joint and several debt, one of them has no equity to compel the mortgagee to receive half the debt, and to proceed against his co-tenant's moiety for the collection of the other half, although he tender a sufficient bond of indemnity against eventual loss. *Frost v. Bevins*, 188
22. Nor on a foreclosure against both mortgagors, will a decree be made for a sale of the undivided moieties separately, for the respective half parts of the debt. *id.*
23. The doctrine of principal and surety is not applicable, and the creditor is entitled to receive his whole debt, or to have the usual decree for a sale of the whole premises. *id.*
24. A husband and wife joined in executing two mortgages, accompanying his two bonds; all being given for the same debt. This was in part a pre-existing debt of the husband's, and in part money advanced to him at the time. One mortgage was on his own lands, the other was on the wife's inheritance.—*Held*, 1. That the husband's lands were the primary fund for the payment of the mortgages, and the wife's became the secondary or auxiliary fund for that purpose. She became the surety for her husband in respect of the latter. 2. That the suretyship is made out in such a case, by showing that it was the husband's debt, or that he received the money advanced. If the money were used for the benefit of the wife or her property, or any circumstance exist which will defeat her claim to be regarded as a surety; it must be proved by the party alleging such fact. *Loomer v. Wheelwright*, 135
25. Where one of two joint mortgagees, each of whom owned in severalty a part of the mortgage debt, paid to his co-mortgagee a portion of the debt of the latter, with the express purpose of discharging his lien; the former cannot enforce the mortgage for such payment, or be subrogated in respect thereof. *id.*
26. A surety who gives a separate mortgage, on conveying a part of his lands in satisfaction of the debt, is entitled to be subrogated to the mortgagee's claim on the mortgage of the principal debtor. *id.*
27. After a first mortgage was cancelled, wrongfully, the banker to secure his advance, made upon it, obtained from the grantee who cancelled it, a mortgage on other lands of some value; and subsequently the grantee gave to him another mortgage on those lands, to secure debts due to the banker as trustee. After this he conveyed the lands to the banker in fee, in trust for several persons. It appeared that as between the original mortgagor and such grantee, the latter was liable in respect of his lots formerly subject to the mortgage, to pay a part of such advance. *Held*, that on the banker's re-instating and enforcing the original mortgage, a second mortgagee stood in the place of a surety for such grantee to the extent of his liability to make good the advance, and was entitled to that extent, to the benefit of the subsequent security taken for the advance, by the banker, from the grantee. *King v. McVickar*, 192
28. *Held* also, that such equity of the second mortgagee, could not be enforced against the beneficiaries under the con-

vayance to the banker in trust, until they were made parties to the suit. *id.*

29. Where there is to be a long controversy as to the extent of the equity of a second mortgagee, who is entitled to a subsidiary security obtained by the first mortgagee; the civil law rule of subrogation will be adopted, and a decree for the satisfaction of the first mortgage made at once, instead of requiring the holder thereof in the first instance to resort to his ancillary security. *id.*

30. The decree will at the same time, provide for the second mortgagee's right of subrogation to such security. *id.*

31. The purchaser of land which is conveyed to him subject to a mortgage executed by the vendor, is not entitled to the benefit of a collateral security which the vendor placed with the mortgagee subsequent to the execution of the mortgage. *Brewer v. Staples*, 579

32. After such a conveyance, the land becomes the primary fund for the payment of the mortgage debt, and the personal liability of the mortgagor is the secondary fund. The mortgagor stands, in respect of the land, as a surety for the mortgage debt. *id.*

See MORTGAGE, 33, 42, 43.

MORTGAGE, VII.

Assignment of mortgages and the rights consequent thereon.

33. Where M. who was liable for a mortgage debt, sold the land to one who assumed the debt, and M. was afterwards compelled to pay it; *held* that he could proceed to foreclose the mortgage for his indemnity, and that his right to foreclose was perfect without an assignment of the bond and mortgage; and an agreement by M. to forbear collection on receiving such assignment, was without consideration and invalid. *McLean v. Towle*, 117

34. A mortgagor, and one to whom he had

subsequently conveyed part of the lots mortgaged, subject to a portion of the debt, applied to a banker to advance money to satisfy the mortgagee. The banker made the advance, on such grantee of part of the lots, agreeing to take an assignment of the mortgage for his benefit and security, as against the lots remaining in the mortgagor, half the sum requisite to satisfy the mortgagee, being furnished at the time, ostensibly by the grantee. Payment was made to the mortgagee, who assigned the mortgage to the grantee; and he soon after cancelled it of record, without the assent or knowledge of the banker.

Held, that the transfer for the benefit of the latter was valid, and the subsequent discharge of the same was void, and that he could re-instate the mortgage, and foreclose it against the lots still owned by the mortgagor, and against a second mortgagee of the same, whose lien was prior to the cancellation, but subsequent to the first mentioned mortgage. *King v. McVicker*, 192

35. An assignment of a mortgage, carries with it all the incidents to its payment. Thus in the instance of infant's mortgage of goods, it was held that an assignment carried the mortgagee's right to an account, and to the chattels mortgaged, as well as to an action for those converted; whether the infant affirmed, or disaffirmed the mortgage. *Ottman v. Moak*, 431

36. Pending a suit to redeem from a mortgagee in possession, lands which he claimed absolutely, the mortgagor made an assignment of the subject matter, for the benefit of creditors.—*Held*, 1. That the assignment transferred all the mortgagor's estate and interest. 2. That it was not within the provision of the revised statutes against champerty. *Borst v. Boyd*, 501

37. The mortgagor's assignment conveyed all his real estate and things in action, in trust, to sell and dispose of the same, and to apply the proceeds for the benefit of creditors.—*Held*, that the assignees took the estate and property, and not a mere power in trust; and that the

words "real estate," were sufficient to pass the equity of redemption. *id.*

See MORTGAGE, 19, 20, 33, 34, 44.

MORTGAGE, VIII.

Of the payment and satisfaction of mortgages, and application of payments; of merger and extinguishment.

38. A debtor on a mortgage bearing six per cent interest, who at the end of each half year for several years, pays seven per cent, taking receipts, each expressed to be for six month's interest; cannot have the excess beyond six per cent., applied to extinguish the principal. *The New York Life Insurance and Trust Company v. Manning*, 58

39. Each receipt so accepted by the debtor, is evidence of an agreement to pay seven per cent. interest for the preceding six months; and whether it be deemed antecedent or made at the time of payment, it has the same consideration, the creditor's forbearance; and having been executed, the court will not interfere, even if the agreement were not such as could have been enforced. *id.*

40. Such receipts are not evidence of a continuing agreement to pay the higher rate of interest beyond the period which they cover. *id.*

41. In equity the payment of a mortgage by a surety, does not extinguish it, and he may enforce it by a foreclosure. *McLean v. Toule*, 117

42. A second mortgagee, holding also the mortgage liability of a surety, bought of the mortgagor, the premises mortgaged, for a price exceeding the first lien and his own combined, and received an absolute deed, subject to the first lien. The excess beyond the first lien, was not applied to the debt secured by the second mortgage; but shortly after the sale, the purchaser agreed in writing with the principal to apply the net profits beyond the price paid, to that mortgage debt. *Held*, as between him and

the surety, 1. That his mortgage was merged by receiving the conveyance in fee, and that his debt was extinguished. 2. That if it were otherwise, he must account to the surety for the price paid beyond the amount of the first lien; and this being more than the debt, the surety was discharged. 3. That as between the principal debtor and the mortgagee the latter could still enforce the debt. *Loomer v. Wheelwright*, 135

43. Although in the absence of direct proof of intention, equity will intend a merger or the contrary, from the interest of the party taking the deed being in one direction or the other; it cannot prevent a merger contrary to his interest, where he clearly intended to do the acts which legally effect a merger, although he may have done them under an erroneous view of their legal consequences. Where two persons are joint mortgagees, but are each owners in severalty of a part of the mortgage debt; one of them may so act as to merge his own mortgage interest, without affecting that of the other. *id.*

44. An assignment of a mortgage to one who has taken a conveyance of a part of the mortgages premises from the mortgagor, will not operate as a merger in respect of the premises still owned by the latter. *King v. McVickar*, 192

45. There is a wide distinction between a payment and a set off; and under an answer setting up *payments* made towards a mortgage debt, evidence of corresponding sums due from the mortgagee to the mortgagor, which might be set off, is inadmissible. *Green v. Storm*, 305

46. There is no rule of law, which will apply distinct debts due from and to the same parties as a payment of each other unless by the assent of both parties, or upon proof of facts from which such assent is clearly inferrible. *id.*

47. A course of dealing between parties, sometimes entitles two partners to set off their joint demand against the debt of one of the partners. *id.*

48. Where two successive mortgages were executed to a married woman, on premises in which she had a right of dower, and were afterwards assigned by her and her husband to the trustee of her separate estate, previous to which, and before the second mortgage was given, she and her husband entered into possession of the premises, and continued in possession until the trustee proceeded to foreclose the mortgage ;
Held, 1. That the husband before the assignment, was the mortgagee, *jure mariti*, and thus became mortgagee in possession.
2. That no notice of the assignment being given to the owner of the equity of redemption, the latter was entitled to treat the husband as mortgagee in possession, during the whole period.
3. That the clear rents and profits which the husband received, or ought to have received, must be applied to the reduction of the mortgage debt. *Hanley v. Carroll*, 301
49. Where a mortgagee, having a right of dower in the lands mortgaged, enters into the lands after the money is due, the entry will be deemed to have been made as mortgagee. *id.*
50. Where a debtor owing a mortgage debt payable in small annual instalments at a future period, on the application of his creditor, advanced to the latter fourteen hundred dollars, on an agreement that he would apply and indorse two thousand one hundred dollars as a payment on the mortgage, and the creditor receipted that sum as such payment :
Held, 1. That there was no loan nor any forbearance, directly or indirectly, by the debtor to the creditor, and that the agreement was not usurious.
2. That the agreement was supported by a valid and sufficient consideration, and was not unconscionable. *Righter v. Stall*, 608
51. Where about two-thirds of the sum secured by a mortgage, was paid at a time when a small amount was due for interest, and when no part of the principal, (which was payable in ten annual instalments,) was actually due ; and there was no direction given by the debtor, nor any actual application of the payment made by the creditor ; it was *held*, that the law must make the application, and that after discharging the interest due, the balance must be applied rateably, to the exoneration of all and each of the instalments of principal secured by the mortgage. *id.*
- See MORTGAGE, 34.
- MORTGAGE, IX.
- Of redemption of mortgaged premises, and proceedings therefor.*
52. A bill for redemption, which sets forth a liquidation by the parties of the sum payable, and an offer to pay that sum, which was refused, need not contain an offer to pay what may be found due on an account to be taken. *Barton v. May*, 460
53. An assignment of a mortgage as security for a debt, by a mortgagee in possession, is evidence that the mortgage is redeemable. *Borst v. Boyd*, 501
54. The mortgagor, on a bill to redeem, may rebut the objection of lapse of time, by proof of such an assignment, or of similar acts by the mortgagee, although the mortgagor was not a party to the same. *id.*
55. A mortgagee's possession within the period of limitation, is not adverse to the title of the mortgagor, so as to defeat a conveyance executed by the latter to a stranger. *id.*
56. While the mortgage is redeemable, the mortgagee's possession is deemed to be in trust for the mortgagor. *id.*
57. Where the mortgagee in possession, has sold and conveyed a portion of the lands, the mortgagor coming to redeem, may affirm the sale, and require the mortgagee to account for the purchase money : in which event, there will be

no account of the rents and profits of such portion, subsequent to the sale. *id.*

See PLEADING, 7 to 9.
TRUSTS, 7, 8.

MORTGAGE, X.

Foreclosure; Defence; Decree.

58. A mortgagee, whose debt is all due and is defectively secured, by procuring a receiver, obtains an equitable lien on the unpaid rents of the lands mortgaged. *Lofsky v. Maujer*, 69

59. Previous to the appointment of a receiver in a foreclosure suit, the owner of the equity of redemption by purchase from the mortgagor, had received from his tenant, a note for the rent accrued and a mortgage on personal property, executed by a friend of the tenant, for its further security; but no actual payment had been made.—*Held*, that there was no merger of the rent, but the landlord's right to distrain continued; and that the receiver was entitled to the unpaid rent in preference to the owner of the equity of redemption. *id.*

60. Where a mortgagee, having two mortgages for the same debt, one on the principal debtor's lands, and one on lands of a surety whose infant heir has succeeded thereto, after the debt was satisfied by a conveyance of the former, filed a bill against the infant to foreclose the mortgage on the lands of the latter, in which he claimed the mortgage money to be due, and the infant answered by his guardian *ad litem*, no defence was set up, the usual decree for a foreclosure and sale was made, and the infant's lands were sold under the decree, the mortgagee becoming the purchaser of a portion of the same; it was *held*, that the decree was obtained by fraud, and it was set aside on an original bill. *Loomer v. Wheelwright*, 135

61. Also *held*, that the mortgagee must release to the infant the lands bought in by him, and account for the rents and

profits of the same, and for the sums paid by the purchasers at the sale, who were strangers to the fraud. *id.*

62. Where one defendant in a foreclosure suit sets up equities against his co-defendants, respecting the order of sale of different portions of the mortgaged premises; the decree of sale may direct the master to ascertain and settle those equities, and to sell the premises accordingly. *The N. Y. Life Insurance and Trust Co. v. Culler*, 176

63. In a foreclosure, where one of three mortgagees died pending the suit, which was revived and proceeded in the name of the survivors, without any objection being made until the hearing, the court made a decree of foreclosure and sale, with suitable provisions to protect the rights of the legal representative of the deceased mortgagee, the complainants also undertaking to give effect to such rights. *Green v. Storm*, 305

64. Form of the provision for that purpose in the decree; Note *a*, at the end of the case. *id.*

65. Complainants succeeding in a foreclosure suit, excluded from recovering costs unnecessarily incurred. *id.*

See MORTGAGE, 21 to 23, 30.
PLEADING, 2.

Also see CORPORATIONS, 1, 2.
TRUSTS, 5, 6.
USURY, 7, 8, 20 to 23.

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NEXT OF KIN.

See DESCENT.
EXECUTORS AND ADMINISTRATORS,
3 to 8.

NOTICE.

See DEBTOR AND CREDITOR, 7, 8.
MORTGAGE, 1, 2, 8 to 10.

O

ONUS PROBANDI.

See CORPORATIONS, 11.

P

PAROL AGREEMENT.

See LANDLORD AND TENANT, 1, 2.
SPECIFIC PERFORMANCE, 2 to 5.

PAROL EVIDENCE.

See AGREEMENT, 2.
EVIDENCE, 3.

PARTIES.

In a suit to compel A. to transfer stock, on a contract to transfer it if B.'s note were not paid at maturity, B. is a proper party with A. *Smedberg v. Whittlesey*, 321

See AGREEMENT, 2.
CORPORATIONS, 13.
MORTGAGE, 28.
PLEADING, 7 to 9.
PRACTICE, 4, 5, 9.
SALE, 4.

PARTITION.

1. Three persons, who under the construction of a will, turned out to be tenants in common with others, and who had expended a large sum in valuable improvements on the premises, in good faith, supposing that they were the sole owners; were allowed in partition for such amount as the present value of the premises was enhanced by such improvements. *Conklin v. Conklin*, 64
2. One purchasing the shares of some of the tenants in common of land, pending a suit in equity for its partition, becomes

seised of such shares; and if he die, and the decree in the suit direct the land to be sold, his widow will be entitled to her dower in the proceeds arising from his shares. *Church v. Church*, 434

3. On such a purchase, and a subsequent sale under the decree in the suit, the inchoate right of dower of the purchaser's wife, and all liens affecting his share, become impressed upon the proceeds of the sale. *id.*

See HOTCH-POT, 1 to 3.
JURISDICTION, 6.

PARTNERSHIP.

A voluntary joint stock association was formed for owning and conducting ferries. By the articles, seven trustees were to be elected, who were to be vested with the property, hold it for the stockholders, and be liable for the debts; and every vacancy among the trustees, by death, resignation, or otherwise, was to be filled at the annual meeting. B. was elected one of the trustees, and acted. A., another trustee, resigned, whereupon an election of trustees was ordered and notice given, and an election held, at which seven were chosen, displacing B. B. acted as a trustee, in appointing inspectors of election, and at the election voted for seven, including all the old trustees except A. On B.'s being excluded from the further management of the association, he filed a bill for an account and dissolution.

Held, that his acts respecting the election, did not effect a resignation of his office, and that there was no vacancy to be filled except that made by A., and that B. was still a trustee. *Berry v. Cross*, 1

PART PERFORMANCE.

See SPECIFIC PERFORMANCE, 2 to 5.

PAYMENT.

1. There is a wide distinction between a

payment and a set-off; and under an answer setting up payments made towards a mortgage debt, evidence of corresponding sums due from the mortgagee to the mortgagor, which might be set off, is inadmissible. *Green v. Storm*, 305

2. There is no rule of law, which will apply distinct debts due from and to the same parties as a payment of each other, unless by the assent of both parties, or upon proof of facts from which such assent is clearly inferrible. *id.*
3. Where about two-thirds of the sum secured by a mortgage, was paid at a time when a small amount was due for interest, and when no part of the principal, (which was payable in ten annual instalments,) was actually due; and there was no direction given by the debtor, nor any actual application of the payment made by the creditor; it was held, that the law must make the application, and that after discharging the interest due, the balance must be applied rateably, to the exoneration of all and each of the instalments of principal secured by the mortgage. *Righter v. Stall*, 608

See BONA FIDE PURCHASER, 1, 2.
 AGREEMENT, 4.
 CHECK, 1.
 EXECUTORS AND ADMINISTRATORS,
 3, 4, 8.
 LANDLORD AND TENANT, 9.
 MORTGAGE, 38 to 40, 41.

PENALTY.

See FRANCHISE, 7.

PERPETUITIES.

See WILL, 26, 27.

PERSONAL SUCCESSION.

See DESCENT.
 EXECUTORS AND ADMINISTRATORS.

PLEADING.

- I. *Bill; Supplemental Bill; Proof sustaining bill; Cross Bill.*
- II. *Answer and Variance.*

PLEADING, I.

Bill; Proof sustaining its averments; Cross Bill; Supplemental Bill.

1. Under a statement in the bill, that by an act of the legislature of another state, a corporation was created with various powers and duties; the complainant cannot prove that the charter of such corporation, conferred on it the power to loan money on real estate and to take bonds and mortgages. *Bard v. Chamberlain*, 31
2. A cross bill will be sustained, in behalf of a second mortgagee, who is placed in the relation of a surety as to one of two mortgagors who executed the mortgage to the first mortgagee. *King v. McVickar*, 192
3. The bill stated, that a note was not paid when due, but was duly protested, and notice duly and legally given to the indorser, and as evidence thereof, referred to a notary's certificate annexed. It appeared in proof, that the demand and notice were made and given by another person.—*Held*, that the proof was competent, and the reference to the certificate might be rejected as surplusage. *Smedberg v. Whittlesey*, 321
4. The court of chancery is as much restricted as any other court, to the issues made by the pleadings; and while it endeavors to avoid technical and narrow grounds of objection, it cannot, without losing sight of essential principles, admit evidence of a different case from that pleaded. *Green v. Storm*, 305
5. A bill for redemption, which sets forth a liquidation by the parties of the sum payable, and an offer to pay that sum, which was refused, need not contain an offer to pay what may be found due on

- an account to be taken. *Barton v. May*, 450
6. A cross bill, which seeks no discovery, and makes no defence which was not equally available, by way of answer to the original bill; will be dismissed with costs. *Weed v. Smull*, 273
7. Where one, *pendente lite*, acquires the interest of a party in the suit, and thereupon files a supplemental bill; he must make all the parties to the original bill, whether complainants or defendants, parties to his supplemental bill. *Borst v. Boyd*, 501
8. The assignees of a mortgagor, *pendente lite*, who was prosecuting a suit for redemption, filed a supplemental bill, against the original defendants; and afterwards filed a second supplemental bill against one who, pending the suit, had purchased at a sheriff's sale, the right of the mortgagee in possession, under a judgment recovered by a stranger, prior to the suit.—*Held*, that the right of such purchaser, having originated prior to the original suit, the second supplemental bill was an *original bill in the nature of a supplemental bill*, and was as to him, a new suit. And that the proceedings and testimony in the original suit, and first supplemental suit, (except so much of the same as were introduced into the second supplemental bill,) could not be read against such purchaser. *id.*
9. The mortgagee in possession and his assignee, claiming some rights in the premises, were held to be necessary parties with such purchaser, in the second supplemental bill. *id.*
10. An allegation in a bill that the defendant *resides* in a place specified, relates to the time of filing the bill, and not to a prior period. *Wheeler v. Heermans*, 597
11. A defendant who sets up an equitable title to land, against a mortgagee in good faith of the legal estate without actual notice; in order to affect the latter with constructive notice, by means of his possession at the date of the mortgage, should allege in his answer that he was then in possession, claiming the land as his own. It is not sufficient to allege that the defendant was in possession at, and long before, the execution of the mortgage. *The N. Y. Life Insurance and Trust Co. v. Culler*, 176
12. An answer stated the execution and delivery of an assignment in trust for creditors, and referring to the instrument, averred that a copy of it was set forth in a schedule annexed, to which the defendant referred as a part of his answer. The answer then stated the recording of the instrument on the day of its date, and mentioned the book in which it was recorded. The schedule contained the assignment at length, acknowledged before a commissioner of deeds.
Held, that the deed might be read at the hearing, under these allegations. *New v. Bame*, 191
13. Where a bill states the indorsing of a note by the defendants, payable at a particular place, and the answer admits the indorsement of the note, without any qualification, the defendant cannot prove that the place of payment was inserted after he indorsed it. *Smedberg v. Whittlesey*, 321

See JURISDICTION, 5.
USURY, 22, 23.

POSSESSION.

See MORTGAGE, 1, 2, 48, 49.

POWER.

See INTERPLEADER, 3.
PROMISSORY NOTES, 1 to 6.

PLEADING, II.

Answer, and Variance.

POWERS.

See DEED, 3, 4.
MARRIAGE SETTLEMENT, 4.
WILL, 27.

PRACTICE.

Testimony in supplemental suit; Re-examination of witnesses; Decree between co-defendants; Against one consenting to be bound; Decrees in various cases.

1. Testimony taken by the complainants on a supplemental bill, cannot be read against those defendants in the prior suits, who were not made parties in such bill. *Borst v. Boyd*, 501
2. A witness, whose examination is apparently closed, and an adjournment taken place, and another witness been examined; cannot be recalled by the party for whom he has testified, and examined anew on the subject of his former examination. *Ordonaux v. Helie*, 512
3. Nor can a party reserve the right to recall a witness, whose examination has been proceeded in; without the consent of the adverse party, unless the officer taking the testimony shall so direct for cause shown. *id.*
4. The vendee who has assigned his contract, is a proper party in a suit by his assignee against the vendor, for a specific performance; but if he be omitted, and no objection be raised till the hearing, the court will direct a decree, on his executing and filing an assent and agreement in proper form, to be bound by the decree. *Voorhees v. De Myer*, 614
5. A controversy decided between co-defendants, in respect of the fund sought and recovered by the bill; where the material facts were stated in the bill, and their respective claims were argued at the hearing. *Davison v. De Freest*, 456
6. A subsequent suit against heirs, in behalf of all creditors, will not affect a

suit already instituted by a creditor in his own behalf, unless an order of the court be obtained directing him to come in under the former proceeding. *Van Wezel v. Wyckoff*, 428, 528

7. A creditor of the ancestor, who is entitled to maintain a suit against heirs in respect of the real estate descended to them, may have a decree against the proceeds of such real estate where the same have been paid into court upon a sale of the property under an order or decree of the court. *id.*
8. Where one defendant in a foreclosure suit sets up equities against his co-defendants, respecting the order of sale of different portions of the mortgaged premises; the decree of sale may direct the master to ascertain and settle those equities, and to sell the premises accordingly. *The N. Y. Life Insurance and Trust Co. v. Culler*, 176
9. In a foreclosure, where one of three mortgagees died pending the suit, which was revived and proceeded in the name of the survivors, without any objection being made until the hearing, the court made a decree of foreclosure and sale, with suitable provisions to protect the rights of the legal representative of the deceased mortgagee, the complainants also undertaking to give effect to such rights. *Green v. Storm*, 305
10. Form of the provision for that purpose in the decree; Note a, at the end of the case. *id.*
11. In a suit for waste against a tenant for life and her under-tenant, on a decree for an account against both, the former may insert a provision that the master ascertain what portion of the sum reported against her, should be paid by the under-tenant. *Sarles v. Sarles*, 601
12. Directions in a decree for an account of waste committed by a tenant for life and her under tenant, in respect of timber, dilapidations, undue tillage and withdrawing manure. *id.*

See ATTORNEY, 5.
 BANKRUPT, 2.
 DOWER, 3.
 EXECUTORS AND ADMINISTRATORS, 7.
 INTERPLEADER, 1 to 3.
 MORTGAGE, 28 to 30.
 PLEADING, 4, 7 to 9, 12.
 WILL, 12.

PRESUMPTION OF DEATH.

See INTERPLEADER, 3.

PRINCIPAL AND AGENT.

1. An agent entrusted with the sale of real estate, cannot directly or indirectly, become the purchaser thereof under the power conferred upon him. *Dobson v. Racey*, 60

See PROMISSORY NOTES, 1 to 6.

SALE, 1 2, 4.
 TRUSTS, 7, 8.

PRINCIPAL AND SURETY.

1. A husband and wife joined in executing two mortgages, accompanying his two bonds; all being given for the same debt. This was in part a pre-existing debt of the husband's, and in part money advanced to him at the time. One mortgage was on his own lands, the other was on the wife's inheritance.—*Held*, 1. That the husband's lands were the primary fund for the payment of the mortgages, and the wife's became the secondary or auxiliary fund for that purpose. She became the surety for her husband in respect of the latter. 2. That the suretyship is made out in such a case, by showing that it was the husband's debt, or that he received the money advanced. If the money were used for the benefit of the wife or her property, or any circumstance exist which will defeat her claim to be regarded as a surety; it must be proved by the party alleging such fact. *Loomer v. Wheelwright*, 135

2. A second mortgagee, holding also the mortgage liability of a surety, bought of the mortgagor, the premises mortgaged, for a price exceeding the first lien and his own combined, and received an absolute deed, subject to the first lien. The excess beyond the first lien, was not applied to the debt secured by the second mortgage; but shortly after the sale, the purchaser agreed in writing with the principal to apply the net profits beyond the price paid, to that mortgage debt. *Held*, as between him and the surety, 1. That his mortgage was merged by receiving the conveyance in fee, and that his debt was extinguished. 2. That if it were otherwise, he must account to the surety for the price paid beyond the amount of the first lien; and this being more than the debt, the surety was discharged. 3. That as between the principal debtor and the mortgagee the latter could still enforce the debt. *id.*

3. Although in the absence of direct proof of intention, equity will intend a merger or the contrary, from the interest of the party taking the deed being in one direction or the other; it cannot prevent a merger contrary to his interest, where he clearly intended to do the acts which legally effect a merger, although he may have done them under an erroneous view of their legal consequences. Where two persons are joint mortgagees, but are each owners in severalty of a part of the mortgage debt; one of them may so act as to merge his own mortgage interest, without affecting that of the other. *id.*
4. Where such a joint mortgagee pays to his co-mortgagee a portion of the debt of the latter, with the express purpose of discharging his lien; the former cannot enforce the mortgage for such payment, or be subrogated in respect thereof. *id.*
5. A surety who gives a separate mortgage, on conveying a part of his lands in satisfaction of the debt, is entitled to be subrogated to the mortgagee's claim on the mortgage of the principal debtor. *id.*

6. Where a surety obtains from his principal a mortgage, to secure him against his liability, the creditor is entitled to the benefit of such security. *Ten Eyck v. Holmes*, 428

7. And if the surety include in such mortgage, a debt due to himself, as well as the indemnity against the principal's debt for which he is surety; as between himself or his voluntary assignees, and the creditor, the latter is entitled to be first paid, out of the proceeds of the mortgage. *id.*

8. As a *quasi* trustee for the creditor, in respect of the indemnity thus obtained; the surety is bound to pay over to him the first proceeds, in preference to paying them to any of his own general creditors. *id.*

9. A surety, on paying the debt of his principal, is entitled to the benefit of securities obtained by the creditor through a sale on a judgment for the same debt, recovered against the principal debtor. *Ottman v. Moak*, 431

See MORTGAGE, 21 to 23, 27 to 32.

PRIOR EQUITY.

See PRINCIPAL AND SURETY, 1 to 8.

PRIVILEGED COMMUNICATION.

See ATTORNEY, 1 to 4.

PROMISSORY NOTES.

1. A bank holding a promissory note made by L. and indorsed by P. for his accommodation, when the note fell due, to enable L. to pay it, discounted for him his own note; to secure which L. delivered to the bank, another promissory note made by himself and indorsed by P., dated about a year prior to that time and payable two years after date. When this delivery took place, P. was dead, and the officers of the bank were aware of the fact. The original note was not

protested, and was cancelled under this arrangement. *Held*, that neither P. nor his executors, were ever liable upon the note thus negotiated after his death; and that it was not a charge upon real estate, which P. after its date, devised subject to the payment of all notes which he had endorsed for L. *Smith's Executors v. Wyckoff*, 77

2. A note indorsed for the accommodation of the maker, has no vitality, or existence as a contract, while it remains in his possession. *id.*

3. An indorsement on a blank sheet, intended for a note, authorizes the person to whom it is delivered, to write upon the sheet such note as he thinks proper. *id.*

4. All accommodation indorsements delivered to the principal debtors, clothe the latter with an *authority* to bind the indorsers in favor of persons who receive the securities in good faith on the credit of the indorsements. *id.*

5. Such authority is a mere naked *power* revocable by the constituent. *id.*

6. All such powers are annulled by the death of the constituent. The death of an accommodation indorser of a promissory note, before it is negotiated by the maker, annuls the latter's authority to issue the note as one binding upon the indorser. *id.*

7. Where a party to an usurious bill or note, gives a new security for it to a holder for value, without notice of the usury, the new security is valid, although the holder could not have recovered on the bill or note. *Smedberg v. Whittlesey*, 300

8. The possession of a bill or note by an indorsee, is presumptive evidence that it was transferred to him on a good consideration before its maturity. *id.*

9. The giving of a new note without objection, by the debtor on an usurious note held by an indorsee, is of itself an admission that the indorsee is a *bona fide*

holder of the old note, without notice of the usury. *id.*

10. In a suit upon a new note so given, the holder may rely upon such admission in connection with his possession of the old note, to overcome the defence of usury in the latter. And the burden of proof will be cast upon the defendant, to prove that the holder had notice of the usury, or received the usurious note without a sufficient consideration. *id.*

See BONA FIDE PURCHASER, 1, 2.
PLEADING, 3, 13.
USURY, 17, 18.

PURCHASE BY AGENT, TRUSTEE &c.

See PRINCIPAL AND AGENT, 1.

PURCHASER.

See DEBTOR AND CREDITOR, 7, 8.
SPECIFIC PERFORMANCE.

R

RAIL ROADS.

See CORPORATIONS, 15, 16.
FRANCHISE, 1 to 4.

RECEIVER.

See CORPORATIONS, 13.
DEBTOR AND CREDITOR, 7, 8.
MORTGAGE, 58, 59.

RECORDING ACTS.

See MORTGAGE, 8 to 10.

REDEMPTION.

See MORTGAGE, IX.
PLEADING, 5, 7 to 9.

REGISTRY.

See MORTGAGE, 8 to 10.

REMAINDER.

See WILL, 15, 19, 22 to 27.

REMEDY AT LAW.

See JURISDICTION, 5, 7.

RENTS.

See LANDLORD AND TENANT.

RES ADJUDICATA.

1. A decision on a point of law, in a former case, between the same parties in the same court, is not an estoppel, or conclusive; but it is binding upon the same court, though held by another judge, unless the latter be clearly and strongly convinced of its error. *Carter v. Bloodgood's Executors*, 293
2. A decision of the chancellor, against the validity of a will, on the ground of the decedent's mental incapacity, reversing the surrogate's decree admitting it to probate; does not decide the question as to its validity as a will of real estate, either in the court of chancery or any other court. *Clarke v. Sawyer*, 352

See INFANT, 6.

S

SALE.

1. A broker who is requested to purchase stocks, and who thereupon, to fulfil the order, procures stocks from a holder thereof, to be paid for in cash, and delivers them on the same condition to the party employing him to purchase, cannot be treated by the latter as the seller, so as to be paid by an offset of

the broker's own note due to the employer. *Hays v. Currie*, 585

2. In such case, the owner of the stocks is the seller, and the person ordering them is the purchaser. The broker has no interest in the stocks in either capacity. *id.*

3. On a sale of stocks for cash, and a delivery to the purchaser either conditionally that he will pay for them in a few minutes, or through a fraudulent contrivance, without actual payment; the property does not pass, and the seller may recover the stocks from the buyer, or from any person to whom he has transferred them with notice. *id.*

4. J., an insolvent stock broker, owed C. two notes. C. employed K. to aid in effecting payment. K. told J. he wanted J. to buy stocks for him, and next day gave J. an order to buy specific stocks, C. having meantime passed the notes to M., his servant, and procured the latter to give an order on K. for the purchase of the same stocks. J. procured the stocks from H., in order to deliver them for cash, and offered them to K., who then referred him to M. as his principal. J. refused to deliver them to M. without the cash, but was induced by K. to let M. take them on the assurance he would return with the money in a very few minutes. M. did return, and tendered J. his own notes given to C. These were refused, and the stocks demanded, but not given up. C. received the proceeds of the stocks.

Held, 1. That there was no loan or unconditional sale of the stocks by H. to J., but that H. was the seller to K. for cash, through their broker J., and the delivery without payment being fraudulently procured, the title did not pass from H.

2. If it be regarded as a sale by H. to J., the delivery to J. was conditional, and the same result ensues.
3. That H. was entitled to recover the stocks from C., or their value with interest, and the costs of the suit.
4. That K. was a proper party to the suit against C. *id.*

See SPECIFIC PERFORMANCE.
USURY, 3.

SALE BY PUBLIC OFFICERS.

See LOAN COMMISSIONERS.

SATISFACTION.

See MORTGAGE, VIII.

SECURITY.

See MORTGAGE, 7.

SEISIN.

See DOWER, 1, 3.
MORTGAGE, 16.

SET-OFF.

A course of dealing between parties, sometimes entitles two partners to set off their joint demand against the debt of one of the partners. *Green v. Storm*, 305

See COSTS, 4.

EXECUTORS AND ADMINISTRATORS,
3, 4, 8.
PAYMENT, 1, 2.

SHARES.

See CORPORATIONS, 12, 13.

SOLICITOR.

See ATTORNEY.

SPECIFIC PERFORMANCE.

1. It is no objection to enforcing the performance of a contract for the sale of the lands, in behalf of the vendee, that the vendor did not own the lands when

- the contract was made. If he can make a good title to all at the time of the decree, the court will direct him to convey the whole; if he can make title to a part only, the vendee may take such part with a compensation for the residue. *Allerton v. Johnson*, 72
2. In general, the payment of the consideration, is not such a part performance of a parol agreement for the purchase of lands, as will relieve it from the operation of the statute of frauds. *Rhodes v. Rhodes*, 279
 3. But where the consideration consists of services to be rendered, which are of such a peculiar character, that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend to measure them by such a standard; the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol. *id.*
 4. This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family, agreed to provide for and take care of the other, who had no family, and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter. *id.*
 5. *Held* also, that the contract was so far certain and reasonable in its terms, that it ought to be enforced in equity. *id.*
 6. The owner of two lots, which had been sold on an execution against him, agreed with M. that she should buy one of the lots, and pay the price by redeeming both from the sheriff's sale. M. was to take a deed from the sheriff, pay all liens and charges, and on receiving the surplus, beyond the price of the one lot, with interest, at a day fixed, was to convey the other lot to the vendor; or if such payment were not made, was to retain both lots. The vendor was by a like covenant, to give possession of the lot sold to M.—*Held*, that by the agreement, M. became the purchaser of the one lot, and took the other lot as a security for her advances beyond the price of the former; and that she was bound to convey to the vendor, on being refunded, such excess with interest. *Held* further, that if the contract were to be treated as an agreement by M. to sell the other lot to the former owner, on payment of such excess, and receiving possession of the one at the time stipulated; a partial failure to deliver possession at that time, would not warrant M. in refusing to convey the other lot, on receiving the excess. *Barton v. May*, 450
 7. Where parties contract for the sale of land, for a gross sum or price, under a mutual mistake as to the quantity contained in the parcel sold, believing it to contain about a fourth more than its actual contents, and the vendee has taken possession, made valuable permanent improvements, and paid nearly all the price; equity will compel the vendor to convey the land actually owned by him, with a rateable deduction from the price for the deficiency. *Voorhees v. De Myer*, 614
 8. D. sold to G. by an executory contract, two lots of wild land, which by the survey and location thereof made for D. and others, contained 187½ acres; the one intending to sell, and the other believing that he was buying, the lots as thus surveyed. It turned out, that in making such survey and location, the surveyor had extended and marked his line beyond the true boundary of the tract he was laying out, and had thereby included 43½ acres in D.'s two lots, to which he never had any right or claim. *Held*, that this was a case of mutual mistake. That the deficiency was not in the subject matter of the contract, for that was the two lots as marked and surveyed for D.; but that the difficulty was in giving title to that subject matter. *id.*
 9. Equity will not compel a purchaser to take land which is involved in a doubtful and disputed question of boundary. *id.*

See BOUNDARIES.
DEED, 1, 2.
PRACTICE, 4.

STATUTE.
See CORPORATIONS, 8 to 11, 15, 16.

STATUTE OF FRAUDS.
See LANDLORD AND TENANT, 1, 2.
SPECIFIC PERFORMANCE, 2 to 5.

STATUTE OF LIMITATIONS.
See LIMITATION OF ACTIONS.
STOCKS AND STOCKHOLDERS.
See CORPORATIONS, 12, 13.

SUBROGATION.
See JUDGMENT AND EXECUTION, 1, 2.
MORTGAGE, VI.
PRINCIPAL AND SURETY.

SUBSCRIPTION.
See CORPORATIONS, 12, 13.

SUBSTITUTION.
See JUDGMENT AND EXECUTION, 1, 2.
MORTGAGE, VI.
PRINCIPAL AND SURETY.

SUPPLEMENTAL BILL.
See PLEADING, 7 to 9.

SUPPORT.
See WILL, 18.

VOL. III.

SURETY.

See PRINCIPAL AND SURETY.

**SUSPENSE OF POWER OF ALIEN-
ATION AND OF ABSOLUTE OW-
NERSHIP.**

See WILL, 26, 27.

T

TENANT FOR LIFE.

A tenant for life of a farm of one hundred and sixty-five acres, is not entitled to fire-bote for the dwelling of a farmer or laborer, in addition to fire-bote for the principal dwelling house or manseion. And a custom to that effect would be unreasonable and invalid. *Sarles v. Sarles*, 601

See WASTE, 2 to 9.

TENANT IN COMMON.

See DOWER, 1.
LANDLORD AND TENANT, 41, 2.
MORTGAGE, 21 to 23.

TRUSTEES.

See PARTNERSHIP.
TRUSTS.

TRUSTS.

- I. *Of the nature, validity and construction of trusts.*
- II. *Of the transmission of trusts to personal representatives; and the duty, liabilities and disability of trustees and other fiduciaries, in respect of the trust property.*

TRUSTS, I.

Of the nature, validity, and construction of trusts.

1. A conveyance of real estate, in trust to lease the same and to pay and apply the income unto such persons, for such uses and purposes, and in such parts and manner, as E., a married woman, should in writing appoint; and for want of such direction, then to her proper hands; or otherwise to permit her to receive the income for her sole and separate use and benefit; is valid as an express trust. *Rogers v. Ludlow*, 104

2. Such a trust interest in real estate, cannot be subjected to the payment of liabilities, in the nature of debts, created by the wife. *id.*

3. If the conveyance were deemed to create a valid power in trust, instead of an express trust, such liabilities would not be enforced against the wife's interest, under the provision of the revised statutes for compelling the execution of powers in favor of the creditors of the beneficiary. *id.*

4. The revised statutes relative to uses and trusts, do not apply to a marriage settlement of personal property creating no future interests. *Hanley v. Carroll*, 301

See DEED, 3, 4.

TRUSTS, II.

Of the transmission of trusts to personal representatives; and the duty, liabilities and disability of trustees and other fiduciaries, in respect of the trust property.

5. A trustee is not liable for the waste or dereliction of his co-trustee, which was not occasioned by any act or agreement of the former. *Banks v. Wilkes*, 99

6. A testator held a bond and mortgage in his own name, for moneys invested by him for C. By his will he appointed four executors, who all qualified, and who consented that one of their number H., should take the management of the estate. The bond and mortgage came to the hands

of the executors, with the other effects of the testator, and passed into the custody of H., as the acting executor. C. was aware of this disposal of the securities, but did not object or dissent. H. subsequently received a large sum on the bond and mortgage, expended it for his own use, and died without any property. *Held*, 1. That on the death of the testator, his executors succeeded him in the trust, and held the bond and mortgage as C.'s trustees. 2. That the permitting H. to have their actual custody, was not a breach of trust. And 3. that C. could not recover from the other executors, the amount received and squandered by H. *id.*

7. An agent, entrusted with the sale of real estate, cannot directly or indirectly, become the purchaser thereof, under the power conferred upon him. *Dubson v. Racey*, 60

8. D. owning a parcel of land which was mortgaged to R. for its value, executed a power of attorney to R. authorizing him to sell the land, and after retaining the amount due on the mortgage, to pay the surplus to D.'s wife. R. soon after conveyed the land under the power, to H. without consideration, and H. immediately reconveyed it to R. The wife of D. joined in the deed to H., for which she received \$100, from R. On a bill filed by the heir of D., it was *held*, that the sale could not be maintained, and that the heir was entitled to redeem the land from R. *id.*

9. Where administrators sold lands of their intestate, under an order of the surrogate, and one of them purchased the lands at the sale, and the same were conveyed to him by the administrators as such; it was *held*, that the deed was not void, but was voidable in a court of equity, at the instance of any of the heirs of the decedent. *Ward v. Smith*, 592

10. The purchaser under such circumstances, holds the land as a trustee for the heirs, with the right to be reimbursed for his purchase money. And purchasers under him are chargeable with no-

tice of the trust, it being apparent upon the face of his deed.

See LANDLORD AND TENANT, 1, 2.
LIMITATION OF ACTIONS, 2.
LOAN COMMISSIONERS, 3.
MORTGAGE, 11 to 15.
PARTNERSHIP, 1.
PRINCIPAL AND SURETY, 8.
WILL, 16, 17, 21 to 25, 26, 27.

U

UNDUE INFLUENCE.

See WILL, 9 to 12.

UNINCORPORATED ASSOCIATIONS OR SOCIETIES.

See CORPORATIONS, 14.
FRANCHISE.
PARTNERSHIP.

UNSOUND MIND.

See WILL, 1 to 12.

USES.

See TRUSTS.

USURY.

1. When a person in want of money, applies to a capitalist for his note payable at a future day ; offering as security, his own obligation, with an indorser or a mortgage ; and the respective obligations are executed accordingly ; the transaction is a loan. *The N. Y. Dry Dock Co. v. The American Life Insurance and Trust Co.* 215
2. When two persons, who are both desirous to raise money, exchange their own notes to be used for that purpose with third persons ; it constitutes an exchange of securities merely. The effect

is the same as if each had used his own note, with the other's indorsement. *id.*

3. A banking company in New York, which had stopped payment, being desirous of borrowing a large sum of money, applied to a Trust Company, usually lending money in New York, for a loan of their certificates of deposit payable at short dates, and offered to secure the payment of the amount, by their own obligations and a mortgage on real estate of sufficient value. The Trust Company agreed to issue their certificates bearing five per cent. interest, payable in London within two years, for £48,000, sterling, on receiving the bank's promissory notes for £50,000, sterling, payable in London at the rate of \$5 for each £1 sterling, with six per cent. interest, within seven years ; secured by a conveyance of the real estate to trustees, containing a provision that the bank should pay to the Trust Company in New York, the respective instalments of the £50,000, with interest at seven per cent. forty days before each instalment should mature in London, at the rate of \$5 for every £1 sterling. It was understood by the parties, that the Trust Company would negotiate the bank's obligations in London, with their own guaranty, in order to meet their certificates of deposit. The arrangement was consummated between the parties.

Held, 1. That the transaction was a loan by the Trust Company to the bank, and not an exchange of paper, or a sale.

2. That the reservation of £2000, or four per cent. on the principal sum secured to be paid, rendered the contract usurious. *id.*

4. The notes of the bank were negotiated in London, to bankers there. *Held*, nevertheless, that the contract was governed by the laws of New York. *id.*

5. Whenever a commission, in addition to legal interest, is charged by the lender, on discounting a bill or note, or on making advances thereon, unless it be for some real service distinct from the loan itself, and then be a moderate and reasonable charge ; it will be referred to

- the use of the money loaned, and render the transaction usurious. *id.*
6. On applying for a loan, the borrower offered to the lender's agent a collateral advantage, which was likely to be prejudicial to the former, and was certain to be profitable to the latter. The offer was accepted and the loan was made. *Held*, that the offer constituted one of the terms and conditions of the loan. *id.*
7. Where one having a large mortgage on a farm, payable at a distant period with six per cent. interest, at the request of the mortgagor, who had laid out the farm in town lots for sale, cancelled such mortgage and received in lieu of it, thirteen separate mortgages for the same aggregate amount, on thirteen distinct portions of the whole farm, payable when the original mortgage was to be paid, with interest at seven per cent. ; and at the same time received from the mortgagor five hundred dollars for granting the accommodation ; it was *held*, that the transaction was not usurious. *Neefus v. Vanderveer*, 268
8. The advantages proposed to himself by the mortgagor, and the probable inconvenience and hazard to the mortgagee in the exchange of the securities, constituted the consideration for the payment ; and there was no loan or forbearance in the case. *id.*
9. Where a party to an usurious bill or note, gives a new security for it to a holder for value, without notice of the usury, the new security is valid, although the holder could not have recovered on the bill or note. *Smedberg v. Whittlesey*, 321
10. The possession of a bill or note by an indorser, is presumptive evidence that it was transferred to him on a good consideration before its maturity. *id.*
11. The giving of a new note without objection, by the debtor on an usurious note held by an indorsee, is of itself an admission that the indorsee is a *bona fide* holder of the old note, without notice of the usury. *id.*
12. In a suit upon a new note so given, the holder may rely upon such admission in connection with his possession of the old note, to overcome the defence of usury in the latter. And the burden of proof will be cast upon the defendant, to prove that the holder had notice of the usury, or received the usurious note without a sufficient consideration. *id.*
13. A resident of Savannah being in New York, with funds which he had just remitted from S. at an expense of nine per cent. for exchange, loaned the same in N., stipulating for seven and one-half per cent. of the exchange, so paid by him besides legal interest.—*Held*, that the transaction was usurious, and that a succession of notes given in renewal, were also void for usury ; and the last in the series were ordered to be delivered up and cancelled. *Jacks v. Nichols*, 313
14. A prior remittance of the money loaned, from another state or country, not expressly for the purpose of the loan, furnishes no valid pretext to charge the borrower with the charges of such remittance, in addition to interest. *id.*
15. There is an intent to take unlawful interest, within the meaning of the statute, when more than seven per cent. is reserved, although the lender took the surplus under a mistaken idea that he had a right to charge the borrower for expenses or trouble. *id.*
16. The taking of a separate security for the interest and the excess, does not aid an usurious loan ; nor is it material that no part of the unlawful interest was ever paid. *id.*
17. Where the last renewal of a series of usurious notes originating here, was made by the parties, residing in this state, signing the new notes and securities here, (the former being payable here,) and receiving here the notes given up, the contract is to be deemed as made here, and governed by our laws, although the new notes were delivered to the

- lender in another state, where he was temporarily residing. *id.*
18. *Semb* the same law would govern, if the renewed notes had been made and delivered at the lender's residence abroad; there being no new loan, but simply a continuation of the original loan for a further period. *id.*
19. Where a debtor, owing a mortgage debt payable in small annual instalments at a future period, on the application of his creditor, advanced to the latter fourteen hundred dollars, on an agreement that he would apply and indorse two thousand one hundred dollars as a payment on the mortgage, and the creditor receipted that sum as such payment :
Held, 1. That there was no loan nor any forbearance, directly or indirectly, by the debtor to the creditor, and that the agreement was not usurious.
 2. That the agreement was supported by a valid and sufficient consideration, and was not unconscionable. *Righter v. Stall*, 608
20. Where a defence of usury is interposed to the foreclosure of a mortgage, by the purchaser of the equity of redemption, the complainant cannot overcome it by proof that the lands were conveyed subject to the mortgage, unless his bill sets forth the execution and terms of such conveyance. *Hetfield v. Newton*, 564
21. Application for a loan, was made by parties in Western New York, to D. in New Jersey, they expecting D. to obtain the same from H., or some other person there. They offered to give D. \$300, for doing the business and delivering them the money. D. obtained the loan of his father-in-law, H., took the money to the parties in Western N. Y., received their mortgage to H. for the loan payable with interest, and took a mortgage to himself for the \$300.
Held, 1. That D. was the agent of the borrowers, and not of the lender, in negotiating the loan.
 2. That after the loan was agreed upon, he was the agent of both, in perfecting it and taking the mortgage therefor.
3. That the lender was not affected by the agreement of the borrowers to compensate D., and that the mortgage to the lender was not usurious. *id.*
22. In the defence of usury, the proof must strictly sustain the allegation made in pleading. So where in an answer, the usurious agreement was stated to be, that H. was to advance the borrowers \$2000, and D. was to give them his notes, one for \$150, and one for \$450, making the \$2600, for which the security was given; and the proof showed an agreement by which H. was to advance \$2052, in cash, and \$548, in the notes of D., one for \$414, and the other for \$148; it was held a fatal variance. *id.*
23. Where a party setting up the defence of usury, alleged that certain bonds or evidences of debt, were advanced by the lender, and the proof showed that he advanced cash, the variance was held fatal. *The Farmers Loan and Trust Co. v. Perry*, 339

See CORPORATIONS, 11.
 EVIDENCE, 7.

V

VARIANCE.

See USURY, 22, 23.

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE.

VESTED INTERESTS.

See FRANCHISE.

VESTED OR CONTINGENT.

See WILL, 15 to 17, 19, 26, 27.

VICE-CHANCELLOR.

See EXECUTORS, &c., 1 to 7.

W

WASTE.

1. In a bill for waste, proof of a single clear instance of waste committed intentionally, is sufficient to entitle the complainant to a continuance of the injunction and to a decree for an account. The question of costs will be determined after the account is taken. *Sarles v. Sarles*, 601
2. It is scarcely possible to estimate the injury which the destruction of a few valuable timber trees, by a tenant for life on a farm with a scanty stock of wood and timber, may occasion to the owners of the inheritance. Hence bills to restrain waste of this character, are not to be frowned upon by the court. *id.*
3. In an account decreed against a tenant for waste of timber, he may be allowed in mitigation, for fire wood and timber furnished by him for the farm, from other premises. *id.*
4. It is not waste for a tenant for life of a farm, to sell hay to be removed from the farm, where it is the custom of husbandry in the vicinity, to sell hay from farms for consumption by others. *id.*
5. The removal of coarse bog grass from a farm, which had usually been foddered on the farm, held to be waste. *id.*
6. So of the impoverishment of fields, by constant tillage from year to year. *id.*
7. The erection of a new out-house, with timber from the farm, in place of one which had become ruinous, is not waste. *id.*
8. In a suit for waste against a tenant for life and her under-tenant, on a decree for an account against both, the former

may insert a provision that the master ascertain what portion of the sum reported against her, should be paid by her under-tenant. *id.*

9. Directions in a decree for an account of waste committed by a tenant for life and her under-tenant, in respect of timber, dilapidations, undue tillage and withdrawing manure. *id.*

See TENANT FOR LIFE.

WIDOW'S THIRDS.

See EXECUTORS AND ADMINISTRATORS, 4 to 8.

WIFE.

See the references under Title, HUSBAND AND WIFE.

WILL.

- I. *Execution: The mental capacity sufficient to make a will; and of fraud and undue influence in obtaining its execution; Proof of instructions, when necessary.*
- II. *Extrinsic evidence to affect a will.*
- III. *Construction of will; When it effects a charge or conversion, and priority of charges; Validity of the trusts and powers created; Vested or contingent interests and limitations; Who intended by words, "surviving children."*

WILL, I.

Execution: The mental capacity sufficient to make a will; and of fraud and undue influence in obtaining its execution; Proof of instructions, when necessary.

1. In an inquiry as to the mental capacity of a testator, his case is not to be treated as one of general derangement of mind, because for four or five months he was laboring under and recovering from a severe attack of apoplexy, and was suffering its necessary and usual con-

- comitants, a deprivation of reason in the outset, and its gradual restoration.—
Clarke v. Sawyer, 351
2. On the contrary, the recovery from the effects of such an attack, so far as to survive four years without an intervening attack, shows presumptively that the patient must have overcome its most violent and peculiar features. *id.*
 3. The delirium or imbecility of mind, or the unconsciousness, which ensues from violent or acute diseases, is not to be regarded as establishing a general derangement of intellect, so as to throw the burthen of proving a sound mind, upon the party setting up a deed or will, executed long after the force of the disease is spent, or it has terminated in one of a different character. *id.*
 4. On a question of testamentary capacity, the opinions of physicians are proper evidence; but the opinions of other persons, are to be weighed by the facts upon which they are based, and such facts are more important than the opinions. *id.*
 5. Proof of *instructions*, is never called for, when the will propounded is *officious*, i. e. bestows the property upon those who have natural or direct claims upon the bounty of the testator. *id.*
 6. It is only where the person who draws or procures the will, takes a benefit under it, and there are circumstances of suspicion, greater or less, arising from the capacity of the decedent, the extent of the gift to such person, the claims of others upon the decedent, the amount of his property, or the like; that proof of instructions is required. *id.*
 7. A will is not to be set aside, on as slight evidence of mental unsoundness, as would overturn a contract or conveyance executed on a consideration very questionable, or on terms grossly unequal, or a gift *inter vivos*, to one who had no reason to expect it from the donor. *id.*
 8. Valid wills are made daily, by persons in the last stages of disease, when the bodily functions are totally prostrated, and the mental powers much impaired. These circumstances are not considered as entitled to weight, unless the testator's bequests are extravagant, or widely different from those which his situation and that of his family, would lead a sensible man to expect. *id.*
 9. The influence of affection or attachment is not such an influence as will vitiate a will; or the mere desire of gratifying the wishes of one who is entitled to consideration and remembrance in the disposition of the decedent's effects. *id.*
 10. The presumption of undue influence, exercised by a husband over a feeble and dying wife, is far stronger than any that can be indulged when a similar charge is made against a wife in respect of her deceased husband. *id.*
 11. In a suit to set aside a devise on the ground of the mental incapacity of the decedent, and of undue influence exercised by his second wife; it appeared that the decedent, a very active, intelligent, business man, when in his sixty-seventh year, had a severe attack of apoplexy, which entirely prostrated him in mind and body for two or three months; after which he slowly recovered, so far as to transact his business and sign his name, for two or three years. He continued partially paralyzed in his limbs, so as to be confined to his room, and most of the time bed-ridden, though occasionally riding in a carriage. His utterance was impeded, and not intelligible to those unaccustomed to it; and to such persons he appeared childish. After he had recovered from the severity of the attack, his wife died, and seven months after that he married her sister. Nineteen months subsequent to this event, he made a will, giving to her a life interest in all his property, and dividing the capital among his and her relatives. The will was prepared by a solicitor in his presence, carefully read to and signed by him, and the three witnesses to its execution, concurred in his being mentally capable of making it.

His nearest relatives by blood, were two nieces having families, and another an infant; and he gave to the three, five-eighths of his estate after his wife's death. There was conflicting testimony as to his mental capacity, but the court sustained the devise. And there being sufficient mind, and the weight of evidence being against the allegation of undue influence, the court pronounced against that allegation. *id.*

12. The court forbore to direct an issue, (where it would otherwise have resorted to one,) because of the death of witnesses and the great lapse of time; the testimony having been taken eighteen years before the hearing. *id.*

WILL, II.

Extrinsic evidence to affect a will.

13. A charge in a will was, to pay "my bond for \$1500, given to H. O. for money loaned for my son's use." There was no such bond, but the testator had delivered to H. O. a bond payable to M. S. for \$1500, for the purpose described; H. O. having made the loan for M. S. and received the interest as agent. *Held*, that the bond to M. S. was intended and was a valid charge under the devise; and that the evidence was competent to show the misdescription. *Smith's Executors v. Wyckoff*, 77

WILL, III.

Construction of will; when it effects a charge or conversion, and priority of charges; validity of the trusts and powers created; vested or contingent interests and limitations; who intended by words, "surviving children."

14. A devise of a farm to four persons in fee, to be equally divided between them; and in case either of them died without issue living at his death, then the share devised to him, to be equally divided between the survivors and their heirs forever; creates a vested estate in fee in each of the four devisees, in an undivi-

ded fourth of the farm, determinable as to each on his dying without issue living at his death; and the devise over, is a valid future estate in expectancy, or executory devise. *Davison v. De Freest*, 456

15. A testator gave real and personal estate in trust, to be applied for the use of six brothers and sisters, until the youngest of them or the survivor of them should arrive at the age of twenty-one, upon which the trustees were to convey the estate, or what remained, to those six persons, or the survivor or survivors of them, their heirs and assigns forever, share and share alike. And if either of the six should die before the coming of age of their youngest brother or sister, leaving lawful issue, the share of the one so dying should be conveyed to such issue. One of the sisters married, had issue a son, and died, before the youngest of the six became twenty-one, leaving her child and husband surviving. *Held*, waiving the question as to her own interest, that on her death, her son took a vested remainder in fee in the real estate, and a vested interest in the personal property, to the extent of her sixth part. *Beeckman v. Schermerhorn*, 181

16. Also, that on the son's death, his father became entitled to his share of both the real and personal estate. *id.*

17. A testator directed that his wife should receive half-yearly, such sum out of his estate as the trustees and executors of his will, from time to time, should think proper and necessary for her reasonable support: *Held*, that her reasonable support was not to be determined by the amount necessary for her bare subsistence; but regard must also be had to the extent and income of the estate, and the propriety of her living with her children. *Thompson v. Carmichael*, 120

See HOTSPOT, 1 to 3.

18. Lands were devised to the testator's nephew for life, and at his decease to his male heirs which he "now has or may have hereafter;" but in case he should

die without male heirs, then the lands were devised to his female heirs. At the date of the will and the death of the testator, the nephew had four sons living, two of whom outlived him, and two died in his lifetime. M. one of the latter, left a widow, two sons and a daughter; E. the other son, died intestate, and without issue. The nephew had two sons born after the testator's death, one of whom, I. died before his father, intestate and without issue. The other was the complainant in the suit. The nephew had two daughters, of whom one survived him, and the other F. died in his lifetime, leaving several children. On the construction of the will, it was held;

1. That by heirs male of the nephew, the testator meant *heirs apparent*; and that the devise embraced sons born after the death of the testator, as well as those then living.
2. That the sons living at the death of the testator, took vested remainders in fee in the lands, subject to open and let in after born sons; and that the latter took like vested interests, on their births respectively.
3. That the limitation to the female heirs was void, being consequent on an indefinite failure of male heirs.
4. That on M.'s death, his share descended to all his children, male and female.
5. That the testator's nephew, on the deaths of his sons E. and I., inherited their shares; and on his death the same descended, as in an ordinary intestacy, to his children and grand children.

Conklin v. Conklin,

64

19. A testator devised a farm to his son, subject to an annuity to the wife of the testator: subject to the payment of two debts by name, which he had incurred, for his son; also to all other debts which he had signed with or endorsed for his son; subject further, to the payment of debts which his son owed to N. and O., children of the testator; and also subject to the payment of all debts which the son owed to the testator: On a bill to sell the farm to satisfy the charges upon it;

Held, 1. That the annuity to the widow

was entitled to preference over all the others.

2. That the debts which the testator had incurred for his son were next to be paid.
3. That the son's debts to N. and O., and to the testator, were next to be paid without preference; and that there should be no distinction, in favor of or against sureties, between debts of the son to the testator on which were sureties, and those wholly unsecured.

Smith's Executors v. Wyckoff, 77

20. A testator by his will, gave eleven one hundred and sixth parts of his real and personal estate to a trustee, in trust to keep it as it was, or to sell and convey it as he might deem most expedient, and to invest the proceeds in real property or personal securities in his discretion, to collect the rents and income during the life of the testator's son J. and to apply the same to the use of J. during his life, for the support of himself and his family during that time, in sums, time and manner, in the trustee's discretion; and after J.'s death the trust was to cease, and the trust fund with all its increase and accumulations, was to be divided and distributed between the children of J. then living, and the issue of his deceased children, *per stirpes*. If J. left no children, the same was to go to the other children of the testator.

By a codicil, the testator devised and bequeathed all the property, estate or interests, he had by the will devised or bequeathed in trust for the wife and children of J. and their children, heirs, &c., to his son J. and his heirs and assigns, as and for his own proper estate, thereby for that purpose revoking the trust.

Held, on the construction of the will and codicil, that the trust in the will was for the benefit of the wife and children of J., in respect of the sale of the real estate, for the accumulation of the rents and income, and for the application of the same for the support of J.'s family; and that by the codicil, the whole trust was revoked, and an absolute legal estate given to J. in the eleven one hundred and sixth parts of the testator's property.

Coster's Executors v. Coster, 111

21. A testator having a son and five daughters, all infants, gave the residue of his estate to trustees, with directions to pay the annual income to his six children in equal proportions during their lives, and at the death of either of them without lawful issue, his or her share to continue as a part of the residue, the income of which was to be equally divided among the *surviving children*; and if either of his children should die leaving issue, his or her share should be equally divided among his or her children. One daughter died without issue; then another died, leaving one child, a son; and then two other daughters died without issue; *Held*, that the words *surviving children*, were to be construed "*other children*," and that the son of the deceased daughter was equally entitled to share with the testator's surviving children, the proportions of the daughters who died after the decease of his mother. *Carter v. Bloodgood's Executors*, 293

22. The word "survivors" may be construed "others," upon the context and the other clauses of the will, showing the intent of the testator. *id.*

23. And the court will supply words to support the intent, when that is apparent upon the whole of the will taken together. *id.*

24. In the principal case, the bequest over to the grand-children, in the shares of the children who died without issue, whether before or after the death of the parents of such grand-children, is raised by implication from the testator's general intention. *id.*

See RES ADJUDICATA, I.

25. A testator, having a very large real estate, after some minor bequests in his will, gave to his wife for life, in lieu of dower, one-third of the net rents of his real estate, so long as it should remain unsold. He gave to each of his five sons, five thousand dollars, payable out of the sales of his real or personal estate; the legacies to two of whom, G. and W., were to be invested in stock or on mortgage, the interest paid to them

for life respectively, and after their deaths to their respective children, and if either should die without a child living, his legacy was to go to the three other sons and the survivor of G. and W., and the latter's share to be placed in the trusts provided subsequently. To another son, E. he gave the income of three thousand dollars for his life; the fund to be raised out of his real and personal estate; and after his death to be divided among the five other sons. To the widow of a deceased son, T., he gave the interest of ten thousand dollars, during her widowhood, the fund to be raised from sales of his real estate and invested, and afterwards to be divided among T.'s three daughters. To two of those daughters, there was a further legacy of a thousand dollars each.

All the residue of his estate, the testator devised and gave to his executors in trust, to receive the rents thereof, and immediately after his death to sell enough of the real estate to pay his debts; to pay one-third of the net rents to his wife; to pay the interest on the respective legacies, and the annuity to E., out of the rents; that they should and might, from time to time, proceed to sell any part or all of his real estate; the sales to be made with as little delay as the good of the estate would permit, to the extent of investing the several funds, and paying the legacies before provided; and one-third of all sales to be invested, and the interest paid to his wife for life. And in further trust, that upon a sale and final distribution, there should be an estimate of all remaining, and the surplus, including the fund of which E. was to receive the income, and the funds for the use of his wife for life, was to be distributed whenever, as soon, and as often as could be done, to the close of his whole estate and its concerns. Of this surplus, one-seventh was to go to each of three sons absolutely; another seventh to his son G., and another to his son W. The two latter were to be invested, and the interest paid to each for life, and at the death of either, to their respective children. But if either died without children living, the amounts coming to them, or either of them, were to revert

back to and become an integral part of the testator's estate, and be divided between the three sons first named and the survivor of G. and W., or to the children of the latter taking a parent's share: And if one of G. and W. survived the other, his interest was to be limited to the survivor for life, and after his death to be divided as before provided. As to the other two-sevenths of the surplus, the interest of one was to be paid to the testator's daughter H., and of the other to his daughter F., so long as they respectively remained widows; upon their death or remarriage, respectively, F.'s share was to go to her lawful heirs as in cases of intestacy; and the share of H. was to revert back and merge in his estate, and become part thereof, and be divided between his five sons and his daughter F.; but F.'s part was to go to her use while a widow only, and on her death or remarriage, was to go to her children or grand-children, as before provided as to her seventh; and the portions of the sons, G. and W., in the seventh part of H., were to be under the same limitations and uses as before provided in respect of their several seventh parts of the surplus estate. The will also contained powers to lease lots for terms of years, to repair and rebuild, and to exchange gores and irregular pieces of land. In a suit by the children of the testator's son T., to set aside the will, on the ground that the trusts were illegal;

Held, 1. That the provision for the widow of the testator in the real estate, under the will, was to be regarded as a trust of real estate at the death of the testator, and not to be deemed as converted into personalty.

2. That the shares given to F., G. and W., arising from the seventh part of H., in the third of the real estate from which the widow was to receive her income,

were inalienable during three lives in being, and the trusts thereof were void.

3. The same was held of the limitations of the two seventh parts of G. and W. in the same third part. *Arnold v. Gilbert*, 531

26. *Held* further, that the testator did not intend a general distribution, until after the death of both his widow and his son E.; during whose lives, the power of alienation and the absolute ownership were therefore suspended; wherefore,

1. The whole of the seventh designed for H., that for F., and the two sevenths for G. and W., were each and all suspended for three or more lives in being, and were all void trusts.

2. That the trusts of the will, being so far void as to overturn the main design of the testator, the overthrow of the residue necessarily followed; even if the latter were not involved in the fate of the void trust devise to the executors.

3. That the gift to the widow of T. was valid; but the daughters of T. must relinquish their legacies, on coming in as heirs at law.

4. That the legacies of five thousand dollars to the five sons, must fail for the same cause; and also because they were dependent on the void trusts of the will, and those to G. and W. formed a part of the trusts declared void.

5. That being void as express trusts, the devise could not be maintained as a power in trust, in respect of those legacies.

6. That the acts of the trustees under the will must be confirmed, on avoiding the trusts in behalf of the complainants. *id.*

WITNESS.

See ATTORNEY, 1 to 5.

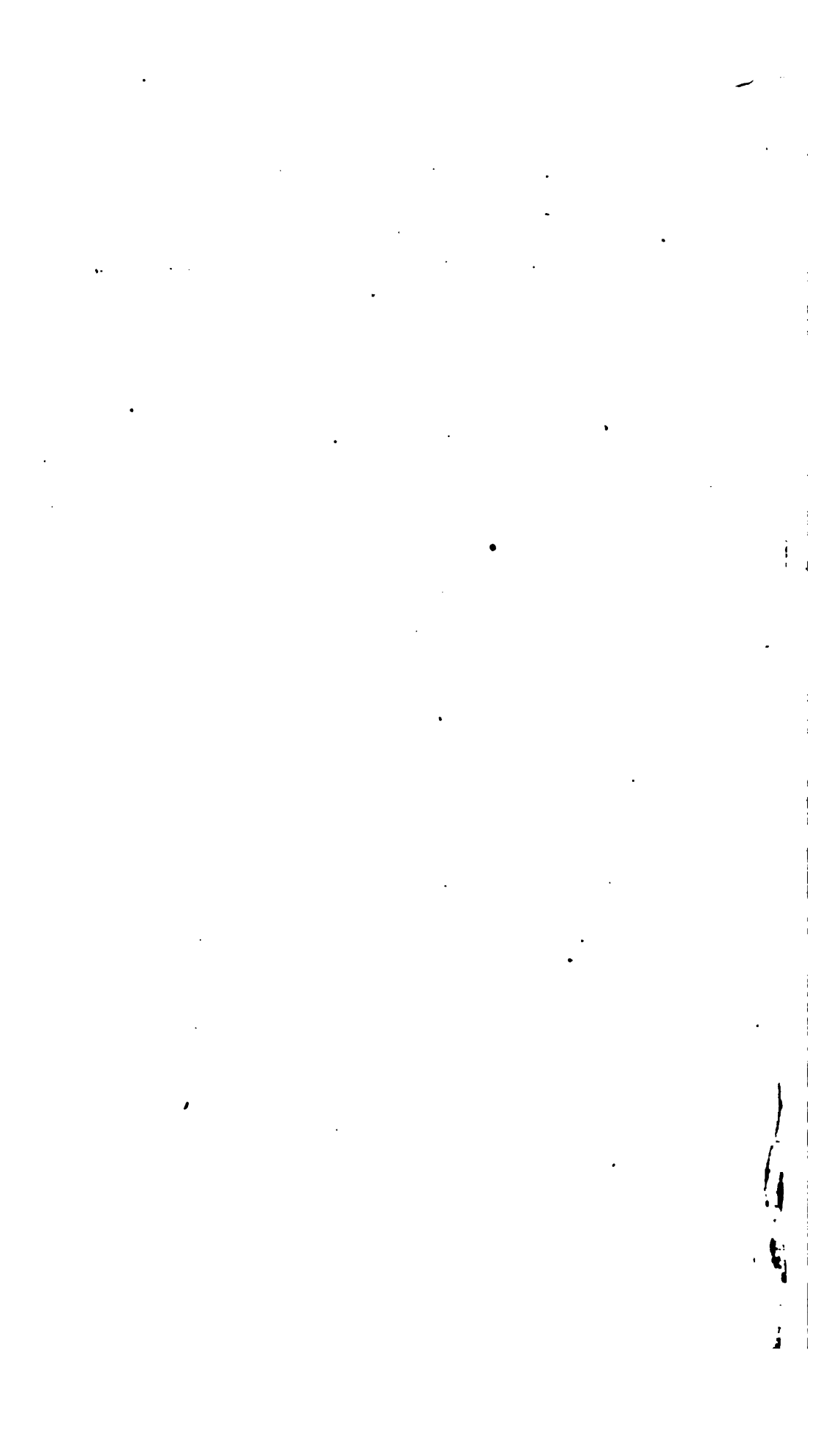
EVIDENCE, 1, 2, 4, 5, 7.

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